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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER and LEANDOUS H. WISSNER,

Appellants,

vs.

MARGARET WISSNER,

Appellee.

Appeal from the District Court of Appeal, State of California, Third Appellate District.

APPELLANTS' BRIEF.

W. COBURN COOK,
Berg Building, Turlock, California,
VERNON F. GANT,
CARLOS J. BADGER,
National Bank Building, Modesto, California,
Counsel for Appellants.

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No. 119

LOUISE M. WISSNER and LEANIOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee.

Appeal from the District Court of Appeal, State of California, Third Appellate District.

APPELLANTS' BRIEF.

The appeal is from the judgment of the District Court of Appeal, Third Appellate District, State of California.

OPINION BELOW.

The trial Court rendered no opinion; its findings of fact, conclusions of law and judgment are at Tr. 10-

16. The opinion of the District Court of Appeal filed January 21, 1949, is reported in 89 A.C.A. 857, 201 Pacific 2d 837 (Tr. 17-29). The Appellate Court denied rehearing without opinion (Tr. 29). The Supreme Court of California denied a hearing without opinion (Tr. 30).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The state courts have refused to apply the provisions of an act of the Congress, upon which appellants relied, and instead have applied conflicting state rules and have held the applicable provisions of the Congressional Act void under the Fifth and Tenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The statutory provisions believed to sustain the jurisdiction of this Court are Title 28, U. S. Code, Section 1257 (1) and (2) and under the authority of *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 547, and *Flournoy v. Weiner*, 321 U. S. 253, 263, the right to a review of the judgment of the lower court by writ of certiorari under Title 28, U. S. Code, Section 1257 (3) is also presented herein.

CASES BELEVED TO SUSTAIN JURISDICTION OF THIS COURT.

Cases believed to sustain the jurisdiction of this Court are:

Logan County National Bank v. Townsend, 139 U. S. 67, 72;

Toledo etc. Railroad Company v. Slavin, 236 U. S. 454, 457;

Green Bay Canal Co. v. Patten Paper Co., 172 U. S. 58, 66;

Missouri etc. R. Co. v. Haber, 169 U. S. 613, 621-622;

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Flournoy v. Weiner, 321 U. S. 253, 263;

Anderson v. Carkins, 135 U. S. 483, 485, 486;

Clearfield Trust Co. v. United States, 318 U. S. 363, 366;

United States v. Emory, 314 U. S. 423, 426-427.

STATEMENT OF THE CASE.

All facts necessary for the determination of the questions involved are admitted in the pleadings (Tr. 1-10).

Issues involving property other than the proceeds of the National Service Life Insurance policy with which we are concerned have been settled by the decision of the Court below.

Appellants are the mother and father of Dr. Leonard O. Wissner who at the time of his death in Kalai Kunda, India, on November 14, 1945, was a Major in the United States Army (Tr. 3-5). Appellee is his surviving widow (Tr. 11).

Dr. Wissner and appellee were married at the City of Glendale, County of Los Angeles, State of California, on the 16th day of August, 1930, and ever since said date and up to the death of Leonard O. Wissner were husband and wife and at all times subsequent to the marriage and until his death were residents of and domiciled in the State of California (Tr. 11).

While Dr. Wissner was serving in the army, he applied for and there was issued to him a National Service Life Insurance policy No. 14N8656931 (Tr. 3, 8), the premiums of which were paid by Dr. Wissner from his army pay (Tr. 3, 8). He designated his mother, Louise M. Wissner, as principal beneficiary of the policy and his father, Leandous H. Wissner, as contingent beneficiary (Tr. 3, 9). The policy was in full force and effect at the time of the Doctor's death (Tr. 12-13) and since that time the Doctor's mother, appellant, Louise M. Wissner, has received funds from the Administrator of Veterans Affairs of the United States, amounting to $76.70 for each month (Tr. 9).

Appellee claims to be entitled to one-half of this payment as received each month under the community property laws of the State of California (Tr. 6). The state courts found in favor of appellee's claim and refused to apply the provisions of the federal statutes

which control the rights in the proceeds of National Service Life Insurance (Tr. 15, 16, 17).

STATUTES INVOLVED.

The federal statute, the provisions of which were held inapplicable and void is Section 3, 49 Statute 609, 38 U. S. C. A. Section 454a, Act of August 12, 1935, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and *shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary* * * *" (Italics ours.)

The provisions of the state statute which the Court applied and which appellants claim are inapplicable to the case and void as applied by the lower Court to the property involved are Civil Code of California, Sections 162, 163, 164, 161a.

> Section 162. "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits, thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."
>
> Section 163. "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents,

issues, and profits thereof, is his separate property."

Section 164. "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; * * *"

Section 161a. "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172[1] and 172a[2] of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

DATE OF JUDGMENT AND APPLICATION FOR APPEAL.

The decision and judgment of the District Court of Appeal were filed January 21, 1949, (Tr. 17). A petition for rehearing was denied February 11, 1949 (Tr. 29).

The District Court of Appeal is the highest Court of the State in which decision could be had unless a hearing were granted by the Supreme Court of California

[1] Appendix page xv.
[2] Appendix page xv.

at its discretion (Constitution of California, Article VI, Secs. 4, 4a, 4b, 4c). A hearing was denied March 21, 1949 (Tr. 30). The application for appeal was presented May 16, 1949 (Tr. 30). Order allowing appeal was made and entered May 16, 1949 (Tr. 33). Probable jurisdiction was noted by this Court October 10, 1949.

RAISING THE FEDERAL QUESTIONS.

Appellants raised the federal questions in their answer (Tr. 8, 9) pressed them throughout the case, argued them in all briefs on appeal[3] and the federal questions were expressly passed on by the District Court of Appeal of the State of California, Third Appellate District (Tr. 17-29).

The Appellate Court in its opinion summarizes appellants' contentions made in their briefs and argument on appeal as follows:

> "Appellants contend, however, that rights to the proceeds of a National Service Life Insurance policy must be determined solely by federal statutes. They cite section 802 (g) of Title 38 U. S. C. A. which provides regarding such policies: 'The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall

[3]Under the California practice, an appeal is taken merely by notice (Tr. 17) and there is no assignment of errors. The questions presented on appeal are stated only in the briefs.

have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.'

"They particularly rely upon section 454a of the World War Veterans' Relief Act, Title 38 U. S. C. A., which provides in part: 'Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, *shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*' (Italics added.)

"Any they assert that Congress by the foregoing enactment not only intended to control the proceeds of such policies after they were paid to them, but that its power to do so is found in the provisions of the United States Constitution, art. I, § 8, granting to Congress the power to 'provide and maintain a Navy', to make rules and regulations for the government and regulation of the land and naval forces, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. They also rely upon Art. VI, paragraph 2, of that Constitution providing that such Constitution and the laws of the United States which shall be made in pursu-

ance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution and laws of any state to the contrary notwithstanding" (Tr. 22-23).

The Court below affirmed the judgment of the lower Court awarding one-half of the proceeds of the National Service Life Insurance policy to appellee in these words:

> "In the case before us the judgment was entered against the beneficiaries for one-half of the payments on the policy which they had already received, and they were ordered to pay to plaintiff one-half of proceeds received by them. Such judgment is fully in accord with the judgments in the Cooke case and other cases above cited, and cannot be said to infringe upon any rights or powers of the United States under the provisions of the United States Constitution relied upon by appellants" (Tr. 26).

The Court stated that the question to be decided on appeal was:

> "The question before us, then, is did Congress intend, by section 454a, supra, to provide that the proceeds of a National Service Insurance policy, after payment of same to a named beneficiary, are not subject to the laws of a state governing title to property within that state, and, if it did so intend, had it the power under the Constitution to so provide, and thus divest a wife in California of property rights which under the laws of this state are community property in which such a wife has a vested interest" (Tr. 23).

and in deciding the question said as follows:

> "Reasoning from the foregoing cases, the conclusion seems to follow that, in view of the Fifth Amendment, the federal government *had no power to provide*, as it is contended it did in section 454a, supra, that payments made to a beneficiary of a National Service Life Insurance policy shall be exempt from the claims of the wid- of the deceased insured to the right vested in her under the laws of this state to one-half of such payments *after* their receipt by the beneficiary" (Tr. 25). (First italics ours).

and continued as follows:

> "As hereinbefore stated, appellants rely upon art. VI, paragraph 2, and art. I, sec. 8, of the United States Constitution. But no cognizance is taken of the Fifth Amendment, which limits the power of the Federal Government as the Fourteenth Amendment limits those of the states, and prohibits the taking of private property without due process of law. It therefore seems to follow that if, as decided in Cooke v. Cooke, supra, a surviving wife of a decedent who had paid for an insurance policy out of community funds could not be deprived of her vested interest in the proceeds of such policy without violating the provisions of the Fourteenth Amendment, the Federal government could not deprive a wife of the deceased veteran of her vested right to one-half of the proceeds of a National Service Life Insurance policy paid for out of community funds, at least after such funds had come into the possession of a named beneficiary other than the wife, without violating the Fifth Amendment" (Tr. 25-26).

and the Court below expressly disagreed with the decision of a Federal District Court in this state which had held that the Federal statutes relied upon by the appellants controlled the rights in the proceeds of a National Service Life Insurance policy and that the California community property laws were not applicable and in disagreeing with the Federal Court said:

> "Appellants cite numerous cases which, they contend, sustain their position; but, with one exception, none of them involved divestiture of vested rights in community property. Assuming but not deciding, the correctness of such decisions, they do not determine the issues in this case, nor is it necessary herein to determine to what extent the Congress could, under its limited powers, exercise control over the proceeds of National Service Life Insurance policies prior to their receipt by the beneficiaries. The exception above mentioned is Barton v. United States, D. C., 75 F. Supp. 703, in which a widow of a deceased veteran applied to the Administrator of Veterans' Affairs to pay to her a one-half interest in the portion of the proceeds of an insurance policy which had resulted from the payment of premiums out of community funds of the spouses. The claim was disallowed and payments were made to the named beneficiary, decedent's mother. It may be conceded without affecting the conclusion in the case before us, that the Administrator properly so acted pursuant to the terms of the policy, which was a contract between the United States and the insured, and that the trial court properly concurred in his deci-

sion. The Barton decision is not, of course, conclusive upon this Court; and we think it is clearly distinguishable in so far as the necessities of that case were determined. But if, as some of the language of the opinion indicates, that Court decided that because of the provisions of section 454a, supra, the Congress intended to and did attempt to provide that where premiums on a National Service Life Insurance policy are paid for out of the community property, in which, under the laws of California, a wife has a vested interest, it must follow that the widow of the decedent may be divested of her community property right by the action of the husband in using such funds for payment of premiums on such insurance without her knowledge or consent, and by naming another than the wife as beneficiary deprive the surviving widow of her vested rights and render it impossible for her to enforce her rights against the beneficiaries after their receipt of the proceeds of the policy, then we must respectfully disagree with the Barton case" (Tr. 27-28).

SPECIFICATION OF ERRORS.

Appellants rely upon all errors assigned (Tr. 35) and for easy reference copy them as follows:

"1. The District Court of Appeal of the State of California ((Fol. 39)) Third Appellate District, erred in affirming a judgment of the Supeior Court of the State of California in and for the County of Stanislaus which awarded one-half the proceeds, paid and to be paid, of a National Service Life Insurance policy to appellee, a soldier's

widow, under the community property law of the state when the soldier had designated appellants, his parents, the beneficiaries of the policy and the federal statutes provide:

> 'Payments made to, or on account of, a beneficiary under any of the laws relating to veterans * * * shall not be liable to attachment, levy, or seizure by or under any legal or equitable process, whatever, either before or after receipt by the beneficiary.'

and thereby deprived appellants of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"2. The District Court of Appeal of the State of California, Third Appellate District, erred in applying the provisions of the California community property law and in awarding one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, to appellee and thereby deprived appellants of their property contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"3. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it failed to apply the provisions of an act of the Congress and awarded appellee judgment for one-half the proceeds of a National Service Life Insurance policy.

"4. The District Court of Appeal of the State of California, Third Appellate District, erred and

deprived appellants of ((fol. 40)) their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress and held that the provisions of the act were invalid under the Fifth Amendment to the Constitution of the United States.

"5. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it held that the provisions of an act of Congress were invalid under the Tenth Amendment to the Constitution of the United States and refused to apply them on appellants' behalf.

"6. The District Court of Appeal of the State of California, Third Appellate District erred and deprived appellants of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it ignored the provisions of Article VI, paragraph 2 of the Constitution of the United States and awarded appellee one-half the proceeds of a National Service Life Insurance policy, paid and to be paid, by applying California laws relating to community property and ignoring the provisions of the federal statutes in conflict therewith.

"7. The District Court of Appeal of the State of California, Third Appellate District, erred and deprived appellants of their property without due

process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States when it refused to apply the provisions of an act of the Congress in appellants behalf and held that the provisions of the act were void under the Fifth and Tenth Amendments to the Constitution of the United States.

"((fol. 41)) PRAYER FOR REVERSAL

For which errors the appellants, Louise M. Wissner and Leandous H. Wissner, pray that the the judgment of the District Court of Appeal of the State of California, Third Appellate District, in the above entitled cause, in so far as it affects the rights of the appellants to retain the proceeds of a National Service Life Insurance policy, be reversed and a judgment rendered in favor of the said appellants on said issues and for costs."

SUMMARY OF ARGUMENT

Among the powers delegated to the Congress by the people in the Constitution of the United States are the powers to provide for the common defense and general welfare of the United States, "to raise and support Armies, to provide and maintain a Navy and to make rules and regulations for the government and regulation of the land and naval forces."[1]

The power given to Congress to make all Laws which shall be necessary and proper for carrying into

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[1]United States Constitution, Article I, Section 8, c11, c12, c13, c14.

execution the foregoing powers[5] is not a limitation on the exercise of the expressly delegated powers but is a further grant of power.

The provisions of the National Service Life Insurance Act provide:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary[6] * * *"

These provisions are the supreme law of the land[7] and state rules of law in conflict with these provisions are void. This enactment having been made pursuant to expressly delegated powers is not invalid under the Tenth Amendment and the property rights having been created by an act of the Congress, the exclusive control of them by the Congress is not a violation of the due process clause of the Fifth Amendment.[8]

As subsidiary to these clearly established basic Constitutional rules of law, it will appear that the enactments by the Congress show an intention to establish a uniform system of insurance completely covering

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[5]United States Constitution, Article I, Section 8, Clause 18.

[6]Section 3, 49 Statute 609; 38 U.S.C.A. Section 454a, Act of August 12, 1935, Chapter 510.

[7]Constitution of the United States, Article VI, Section 2.

[8]*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, Dicta 78, 79; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366; *United States v. County of Allegheny*, 322 U.S. 174

the area of this controversy in words whose meaning as applied to the facts in this case cannot be questioned.

ARGUMENT

I.

CONGRESS HAS THE POWER TO PROVIDE INSURANCE FOR THE MEMBERS OF THE ARMED FORCES.

"The Congress shall have power * * * to raise and support armies * * * to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces;"[9]

"Among the power assigned to the national government are the power 'to raise and support armies,' and the power 'to make rules for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, and the compensation he shall be allowed, and the service to which he shall be assigned. Tarble's Case, Wis. 1872, 13 Wall. 408, 20 L. Ed. 597."[10]

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[9]United States Constitution, Article I, Section 8, Clauses 12, 13 and 14.

[10]Note 1, Constitution, Article I, Section 8, Clause 12, U.S.C.A., page 686.

II.

THE NECESSARY AND PROPER CLAUSE OF THE FEDERAL CONSTITUTION IS A GRANT OF POWER—NOT A LIMITATION ON EXPRESSED POWERS—AND THE COURTS LEAVE TO THE CONGRESS THE QUESTION OF PROPRIETY, WISDOM, NECESSITY, UTILITY AND EXPEDIENCY OF LEGISLATION WITHIN THE SCOPE OF ITS EXPRESSLY DELEGATED POWERS.

We believe that the propositions of law stated in this point are so elementary, so firmly established and so fresh and clear to this Court that a few general statements of annotaters and text writers will suffice.

In the note to this clause in U.S.C.A. beginning on page 449 is the following:

> "2. Discretion as to means employed.—In the gift by the Constitution to Congress of Authority to enact laws 'necessary and proper' for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Legal Tender Cases (Tex., Mass. 1871) 12 Wall. 538, 20 L. Ed. 287. See, also, *Matter of Jackson* (C.C.N.Y. 1877) 14 Blatchf. (U.S.) 245, 13 Fed. Cas. No. 7,-124, petition for writ of habeas corpus denied (1878) 96 U.S. 727, 24 L. Ed. 877, and see *Page v. U. S.* (C.C.A. Cal. 1922) 278 F. 41, certiorari denied (1922) 42 S.Ct. 461, 258 U.S. 627, 66 L. Ed. 799, holding that Congress had

implied power to enact laws for the enforcement of the Eighteenth Amendment.

"Congress has a large discretion as to the means to be employed in the exercise of any power granted to it. *Northern Securities Co. v. U. S.* (Minn. 1904) 193 U.S. 343, 24 S. Ct. 436, 48 L. Ed. 679. See, also, *Fairbank v. U. S.* (Minn. 1901) 181 U.S. 287, 21 S.Ct. 648, 45 L. Ed. 862; *Levin v. U. S.* (C.C.A. Mo. 1904) 128 F. 826, 827.

"Federalist.—This clause is 'only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government and vesting it with certain specified powers. * * * A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes has been previously given, might in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectedly called, authorized the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be

sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless. But suspicion may ask, why then was it introduced? The answer is, that it could only have been done for greater caution, and *to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union*. The convention probably forsaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally sap the foundations of the Union; and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of the provision to declare."

Hamilton, in *The Federalist*, No. XXXIII:

"Within the legitimate scope of this grant, Congress is permitted to determine for itself what is necessary and what is proper. Ex parte Curtis (N.Y. 1882) 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232."

On this subject, 11 American Jurisprudence, Section 138 of Constitutional Law, beginning at page 804 reads as follows:

"One of the most firmly established groups of principles which has become cardinal and ele-

mentary in the field of constitutional law is that the propriety, wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The Courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the Court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people, * * *."

III.

THE TENTH AMENDMENT DOES NOT LIMIT CONGRESS IN THE EXERCISE OF POWERS GRANTED IN ARTICLE I OF THE CONSTITUTION.

If the act is within the power confided to Congress the Tenth Amendment by its terms has no application since it only reserves to the United States powers not delegated to the United States by the Constitution. *Everard's Breweries v. Day*, 265 U. S. 545, 558.

The supremacy of the exercise of federal powers over the rights reserved to the states in all cases where exclusive powers are granted under the Constitution to the Federal Government is also clearly stated in the following cases:

United States v. Darby, 312 U.S. 100-124, 61 S.Ct. 451, 85 L.Ed. 609-22:

"From the beginning and for many years the (Tenth) Amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a

granted power which are appropriate and plainly adapted to the permitted end. *Martin v. Hunter*, 1 Wheat. (U.S.) 304, 324, 325, 4 L. Ed. 97, 102; *M'Culloch v. Maryland*, supra (4 Wheat. (U. S.) 405, 406, 4 L. Ed. 601); *Gordon v. United States*, 117 U. S. 697, 705, and 76 L. Ed. 1347, 1352; Lottery Case (*Champion v. Ames*) 188 U. S. 321, 47 L. Ed. 492, 23 S. Ct. 321, supra; *Northern Securities Co. v. United States*, supra (193 U. S. 344, 345, 48 L. Ed. 703, 704, 24 S. Ct. 436); *James Everard's Breweries v. Day*, supra (265 U. S. 558, 68 L. Ed. 1179, 44 S. Ct. 628); *United States v. Sprague*, 282 U. S. 716, 733, 75 L. Ed. 640, 644, 51 S. Ct. 220, 71 A. L. R. 1381; see *United States v. The Williams* (D. C.) Fed. Cas. No. 16,700. Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. See also *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 330, 331, 80 L. Ed. 688, 702, 703, 56 S. Ct. 466; *Wright v. Union Cent. L. Ins. Co.*, 304 U. S. 502, 516, 82 L. Ed. 1490, 1500, 58 S. Ct. 1025, 36 Am. Bankr. Rep. (N.S.) 950."

United Public Workers v. Mitchell, 330 U. S. 75-96, 91 L. Ed. 754-70:

"The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the

Union is taken. If granted power is found, necessarily the objection of invasion of those rights reserved by the Ninth and Tenth Amendments must fail."

IV.

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT LIMIT CONGRESS IN PROVIDING FOR FUTURE ACTION OR ESTABLISHING RIGHTS IN PROPERTY COMING INTO EXISTENCE AFTER THE ACT PASSED UNDER POWERS GRANTED IN ARTICLE I OF THE CONSTITUTION

A. In general.

Statutes enacted by Congress in exercise of the war power of the government are not affected by the restriction imposed by the Fifth Amendment and Sixth Amendment. (*Page ((Miller)) v. United States*, 11 Wall. 268, 304.)

Generally speaking, the right to enter into and carry out contracts in respect of one's property and private affairs is protected by the due process clause of the Fifth Amendment, but it is well established by the decisions of this court that such liberty is not absolute or universal and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the National Government was created. *Highland v. Russel Car & Snow Plow Co.*, 279 U. S. 253, 261.

The antitrust act was sustained as applied to prevent contracts in restraint of trade in the sale of pipes, the Court saying, "The power of Congress to

regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States." *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 229.

The Act of 1898 (30 Stat. 763) prohibiting advance of wages to seamen was sustained both under the commerce power and because of the special character of seamen's contracts. *Ellis v. United States*, 206 U. S. 246.

The Hepburn Act of 1906 (34 Stat. 584) prohibiting issue of free passes, was not unconstitutional even as applied to abolish rights under a prior agreement, by which a carrier agreed to issue such passes annually for life in settlement of a claim for personal injuries. *Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S. 467.

B. The only rights protected by the due process clause of the Fifth Amendment are vested rights and appellee's claimed rights in the case at bar are not vested.

"Rights are vested when the right to enjoyment has become the property of some particular person or persons as a present interest, independent of a contingency. Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future

benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right. So, inchoate rights which have not been acted on are not vested. Vested rights can arise only from contracts, from statutes, and from operation of law. A vested right can never obtain where its inception is procured by fraud." 16 Corpus Juris Secundum, p. 642, Sec. 215.

"While on the one hand, 'vested' has been said to have a well-understood meaning, and to have a proper legal meaning, like every other word, unless the context controls it, it has, on the other hand, been said to be a flexible word, and capable of bearing more than one meaning. It has been defined as accrued, fixed, settled, absolute, having the character or giving the rights of absolute ownership not contingent, not subject to be defeated by a condition precedent. Primarily, 'vested' is to be interpreted as meaning free from all contingency. In this sense, it is nearly equivalent to 'possessed'. However, the word is often used in a different sense from its technical or strictly legal meaning; thus 'vested' has been construed to mean not subject to be divested or indefeasible; transmissible. It has also been construed to mean payable. Originally, the word had reference only to real estate." 67 Corpus Juris p. 239, Sec. 2.

The state law under which appellee claims provides:

"The respective interest of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interest under the management and control

of the husband * * *." Civil Code of California, Sec. 161a.

Under the California law the husband can use the property in any way he desires so long as he does not make a gift of it and the wife cannot complain.

"It is no doubt the settled law of this state that, where the premiums on an insurance policy issued on the life of a husband after coverture are paid entirely from community funds, the policy is a community asset, and, in view of the provisions of section 172[11] of the Civil Code, the husband cannot make a valid gift thereof without the written consent of the wife; and that where the husband attempts to do so, by naming a third party as beneficiary, the transaction as to the wife's share is voidable and subject to her right of revocation. This principle, however, has no application to the facts of the instant case, inasmuch as there is evidence in the record tending to support the implied finding of the trial court that the designation of the respondent as beneficiary of the proceeds of the policy was made by the assured for a valuable consideration." *Union Mutual Life Ins. Co. v. Broderick*, 196 Cal. 497, 507.

"Section 172[12] of the Civil Code, while it does not specifically create a liability or an exemption for any particular type of community property, gives to the husband 'the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate'. It

[11] Appendix page xv.
[12] Appendix page xv.

reasonably follows from the express language above quoted that this section in effect subjects the entire community personalty (with the exception of the wife's earnings, Civ. Code, sec. 168) to any and all contracts of the husband, as well as to judgments arising out of his tort. Furthermore, since the only limitation upon the husband is to refrain from making a gift of such property without consideration, he is not prevented from paying it out in compromise or satisfaction of a tort claim, for payment of a tort claim is not payment without consideration. * * *"

"With reference to California legislation on the question or liability or exemption of property of the spouses for payment of obligations arising out of the husband's tort, the sole enactments are section 168, which exempts the wife's earnings (community property) from liability for debts of the husband, and section 171, which extends the same exemption in respect to the wife's separate property. It is significant to note that nothing is said in regard to the liability of the husband's separate property, the husband's earnings, or the balance of the community property (the wife's earnings excepted by Civ. Code, sec. 168) in regard to an obligation created by the husband's tort. From this silence of the legislature it logically can be inferred that it was thereby intended that the husband, as agent of the community, should retain the power to divest the parties of their community property by his own act in the same manner that he might divest himself of his separate property, so long as he did not make a gift of the former without consideration. To hold that the husband could not subject

the community property to liability for his tort would be to hold that he could not manage and control the same." *Grolemund v. Cafferata*, 17 Cal. (2d) 679, 683, 684.

The insured was an officer in the United States Army at the time of applying for the insurance and presumably followed the usual method of paying the premiums on his insurance by an allotment from his pay.[13]

His wife certainly had no present right of enjoyment of this money. If he had lost it gambling or spent it sight seeing she would have had no recourse against anyone. Had his government paid him in government bonds similar to the form now issued and Major Wissner had had them issued in his name and his mother's, the California courts would have honored the contract and would not have claimed that the wife's interest was a vested one. *Conrad v. Conrad*, 66 Cal. App. (2d) 280, *Davies v. Beech*, 74 Cal. App. (2d) 304.

"Bonds or obligations of the United States.—All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the names of two persons as co-owners in the alternative, shall, upon the death of either of the registered co-owners, become the sole and absolute property of the surviving co-owner, unless the Federal laws under which such bonds or other obligations were issued or the regulations

[13]Act Oct. 8, 1940, c. 757, Title VI, Part I § 602m, 54 Stat. 1009, 38 U.S.C.A. Sec. 802m, Appendix page viii.

governing the issuance thereof, made pursuant to such laws, provide otherwise.

"All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the name of one person payable on death to a named survivor, shall, upon the death of the registered owner, become the sole and absolute property of the surviving beneficiary named therein, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise.

"This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided." Civil Code of California, Sec. 704 (emphasis ours).

In *United States v. Williams*, 302 U. S. 46, this Court recognizes the right of a minor to drop his insurance policy in spite of a written agreement with his parents that the policy would be kept in force. Major Wissner, an adult, should certainly, therefore, have the correlative right—the right to leave his insurance to his parents.

By becoming members of the armed forces these men were emancipated from state laws and subject only to the laws of the United States. Williams was freed from the obligation under state law to spend his pay to buy insurance for his parents and Major Wissner was freed from the obligation under state law to give half of his insurance to his wife.

C. There are no vested interests in the proceeds of government life insurance except those created by and recognized in the contract between the United States and the assured.

This Court speaking through Justice Holmes in *White v. United States*, 270 U. S. 175, 180, supra, said:

> "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it, and the relation of the government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the government at considerable cost to itself, for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the government's hands to that extent no one else could complain. The only relations of contract were between the government and him. White's mother's interest at his death was vested only so far as he and the government had made it so, and was subject to any conditions upon which they might agree."

In *Von Der Lippi-Lipski v. U. S.*, 4 Fed. (2d) 168, supra, the Court said:

> "It has been held repeatedly that a beneficiary under such a contract of insurance did not have a vested interest in installments of insurance not accrued, and that such contract is not an ordinary contract of insurance, nor is it in the nature of a pension, but is rather of the character and nature of both. *It has also been held that*

the authority of the insured, expressly conferred by statute, to designate whomsoever he desired, within the permitted class, as beneficiary under such contract of insurance was effective, when exercised by the insured, as against those who would otherwise have been entitled to benefits thereunder." (Italics ours).

In *Sizemore v. Sizemore's Guardian*, 222 Ky. 713, 2 S.W. (2d) 395, the Court said:

(2) "It is insisted upon this appeal that the amendment to the statute after the death of the soldier violated the Fifth Amendment to the Constitution of the United States, in that it deprived appellant of her property without due process of law. The argument proceeds upon the theory that the designated beneficiary had a vested right to all of the insurance, which could not be affected by later legislation. The argument is unsound. The beneficiary has no vested right in the installments not due or paid. His right to receive further installments ended at the death of the beneficiary, and *Congress possessed the power to provide where the insurance money should go in every contingency. The interest of the beneficiary was vested only so far as the soldier and the government had made it so, and was subject to any conditions, upon which they might agree. Congress, in creating the right, could annex conditions, and the beneficiary took the right subject to the conditions. White v. U.S.* 270 U.S. 175, 46 S.Ct. 274, 70 L. Ed. 530 annotated; *Helmholz v. Horst* (C.C.A.), 294 F. 417; *Cassarello v. U.S.* (D.C.), 271 F. 486, affirmed (C.C.A.) 279 F. 396; *Gilman v. U. S.* (D.C.), 300

F. 764, affirmed (C.C.A.), 300 F. 767; *Sutton's Ex'r. v. Barr's Adm'r*, 219 Ky. 543, 293 S.W. 1075." (Italics ours).

The following cases contain express statements to the same effect:

Bradley v. United States (1944; C.C.A. 10th Okla.), 143 F. (2d) 573 (cert. den. (1945), 323 U.S. 793, 89 L. Ed. 632, 65 S. Ct. 429);

Woods v. United States (1947; D.C. Ala.), 69 Fed. Supp. 760;

Lincoln Bank & T. Co. v. United States (1947; D.C. Ky.), 71 Fed. Supp. 745;

Dodd v. United States (1948; D.C. Ark.), 76 Fed. Supp. 991;

Citron v. United States (1947; D.C. Dist. Col.), 69 Fed. Supp. 830;

Owens v. Owens (1947), 305 Ky. 460, 204 S.W. (2d) 580.

V.

THE NATIONAL SERVICE LIFE INSURANCE ACT SHOWS AN INTENTION BY THE CONGRESS TO PROVIDE A COMPLETE AND UNIFORM SYSTEM OF INSURANCE FOR ALL MEMBERS OF THE ARMED FORCES.

An examination of the National Service Life Insurance Act of 1940 and its amendments shows that it was the intention of the Congress to control all of the essential incidents of the contract and to give the same rights and privileges to policy holders in every state.

Among other things the act provides:

(a) Insurance shall be granted by the United States to persons on active service.[14]

(b) A person who dies within 120 days of entering active service without having insurance in effect in the amount of $5000 shall be deemed to have applied for and been granted insurance in the sum of $5000, to be paid to a restricted group of beneficiaries.[15]

(c) There are similar provisions for persons totally disabled for six months or more.[16]

(d) Premium rates shall be based on the American Experience Table of Mortality and interest at three (3%) per cent per annum.[17]

(e) Insurance shall be issued on the five year level premium term plan with privilege of conversion on any date of premium payment to relate back to date of original issue.[18]

(f) "The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person *in loco parentis*

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[14]National Service Life Insurance Act of 1940, Oct. 8, 1940, Chap. 757, Title VI, Part I, Sec. 602(a) (54 Stat. 1009), 38 U.S.C.A. Sec. 802 (a), Appendix page iii.

[15]54 Stat. 1009, 38 U.S.C.A. Sec. 802 (d) (2), Appendix page iii.

[16]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (d) (3)), Appendix page iv.

[17]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (e)), Appendix page v.

[18]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (f)), Appendix page v.

if designated as beneficiary by the insured), brother or sister of the insured. *The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided,*"[19] (Emphasis ours).

(g) Payments to beneficiaries shall be in installments and shall be based on the age of the beneficiaries at date of death of insured and in the event of the death of the beneficiaries unpaid installments shall be paid to other beneficiaries named in the act and not to the estate of named beneficiaries.[20]

(h) If no beneficiary is designated or if the designated beneficiary does not survive the insured payments shall be made to beneficiaries specified in the act.[21]

(i) "The right of any beneficiary to payment of any installment shall be conditioned upon his or her being alive to receive such payments."[22]

(j) "*No person shall have a vested right to any installment or installments of any such insurance* and any installments not paid to a beneficiary during such

[19]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (g)). Appendix page vi.
[20]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (h)). Appendix page vi.
[21]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (i)). Appendix page vii.
[22]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (j)). Appendix page vii.

beneficiary's lifetime shall be paid to the beneficiary * * *"[23] provided for in the act. (Italics ours).

(k) "No installments shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made."[24]

(l) The administrator shall prescribe time and method of making payments which may at the election of the insured be deducted from his active service pay.[25]

(m) The amount of the first premium may be advanced from current appropriations for active service pay.[26]

(n) Premiums may be waived during total disability.[27]

(o) Sums necessary to carry out the provisions of the act are appropriated from money in the treasury not otherwise appropriated.[28]

(p) Payments shall be made upon awards by the Administrator.[29]

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[23]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (i)), Appendix page vii.
[24]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (j)), Appendix page viii.
[25]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (m)), Appendix page viii.
[26]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (m)), Appendix page viii.
[27]54 Stat. 1009 (38 U.S.C.A. Sec. 802 (n)), Appendix page ix.
[28]54 Stat. 1011 (38 U.S.C.A. Sec. 804), Appendix page x.
[29]54 Stat. 1011 (38 U.S.C.A. Sec. 804), Appendix page x.

(q) A permanent trust fund is established in the Treasury.[30]

(r) The United States shall bear the cost of administration.[31]

(s) The United States shall pay costs of excess mortality and waiver of premiums due to disability.[32]

(t) The Administrator shall execute the provisions of the act, make rules and decide all questions.[33]

(u) The decision of the Administrator shall be final, except in the event of suit as provided in the act.[34]

(v) No State law providing for presumption of death shall be applicable.[35]

(w) Provisions of various sections of World War Veterans Acts shall apply including Sec. 3, 49 Stat. 609, 38 U.S.C.A. Sec. 454a.[36]

(x) Payments of benefits due or to become due shall not be assignable.[37]

(y) Payments made to, or on account of, a beneficiary:

(1) Shall be exempt from taxation.

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[30]54 Stat. 1012 (38 U.S.C.A. Sec. 805 (a)), Appendix page x.
[31]54 Stat. 1012 (38 U.S.C.A. Sec. 806), Appendix page xi.
[32]54 Stat. 1012 (38 U.S.C.A. Sec. 807 (a) (b) (c)), Appendix page xii.
[33]54 Stat. 1012 (38 U.S.C.A. Sec. 808), Appendix page xiii.
[34]54 Stat. 1012 (38 U.S.C.A. Sec. 808), Appendix page xiii.
[35]54 Stat. 1013 (38 U.S.C.A. Sec. 810), Appendix page xiii.
[36]54 Stat. 1014 (38 U.S.C.A. Sec. 816), Appendix page xiv.
[37]Sec. 3, 49 Stat. 609 (38 U.S.C.A. Sec. 454a), Appendix page ii.

(2) Shall be exempt from the claims of creditors.

(3) Shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.[37]

(z) In the event of a disagreement as to a claim under the act, suit may be brought in any federal district court and all persons claiming any rights in the proceeds may be interpleaded.[38]

VI.

A NATIONAL SERVICE LIFE INSURANCE POLICY BEING A CONTRACT OF THE UNITED STATES IS NOT SUBJECT TO STATE LAW.

A. Generally.

Government insurance contracts are contracts of the United States (*Lynch v. United States*, 292 U.S. 571), and their construction presents questions of Federal law not controlled by the law of any State. *Woodward v. United States*, 167 F. (2d) 774 (C.C.A. 8th); *Cassarello v. United States*, 271 Fed. 486 (M. D. Pa.), affirmed, 279 Fed. 396 (C.C.A. 3d); *United States v. County of Allegheny*, 322 U.S. 174, 183; *Clearfield Trust Co. v. United States*, 318 U.S. 363. As stated in *Woodward v. United States*, 167 Fed. (2d) 774:

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[37]Sec. 19, 43 Stat. 612 (38 U.S.C.A. Sec. 445), made applicable by 54 Stat. 1014 (38 U.S.C.A. Sec. 817). Appendix pages i and xiv.

"Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts. Lynch v. United States, 292 U.S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434. The validity and construction of such policies present questions of federal law. Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 63 S. Ct. 573, 87 L.Ed. 838; United States v. County of Allegheny, 322 U.S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209."

See also dicta in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 79.

National Service Life Insurance contracts being authorized by the National Service Life Insurance Act of 1940, the provisions of that Act, as amended, govern the designation of beneficiaries and payment of insurance proceeds thereunder, and are not subject to and may not be controlled, modified or changed by the community property laws of the State of California. *Barton v. United States*, 75 Fed. Supp. 703 (S.D. Calif.); *Johnson v. Shelton*, Memorandum Ruling No. 522,648 (Superior Court of State of California, County of Los Angeles) (Appendix pp. 16-20 Statement as to Jurisdiction). In the *Barton* case, the Court said (pp. 705, 706):

"Whether state law can control disposition of proceeds of policies issued pursuant to the National Service Life Insurance Act of 1940, 38 U.S.C.A., Secs. 801-818, depends upon the intent of Congress; for it is clear that the Act, being a constitutional exercise of powers granted to

Congress, * * * is 'Supreme Law of the Land' * * * if Congress so willed. * * *

* * * * * * *

"I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A., Secs. 801-818. It follows then that California's Community property law, (Cal. Civ. Code, Sec. 164), can confer no right on plaintiff to share in the proceeds of the policy at bar.

"My learned colleague Judge Harrison so held with respect to the community property law of Texas in James v. United States, et al., D.C., S. D. Cal. 1947. (Appendix C pp. 20-24 Statement as to Jurisdiction.)"

Also as stated in *Johnson v. Shelton*, supra:

"In the case before us the policy of insurance was issued by the Federal Government pursuant to a Congressional act. To the extent then that any State law conflicts with this act of Congress it is of necessity void and of no effect. * * *"

Similar rulings have been rendered without opinions by United States District Judge Ben Harrison, in *James v. United States, et al.* No. 6061-BH, on June 16, 1947, (Appendix C. pp. 20-24 Statement as to Jurisdiction) and also in *Pack v. Pack*, No. 7651 BH; by Judge Campbell E. Beaumont in *Rhodes v. United States et al.* No. 5845-B, and by Judge Jacob Weinberger, in *Hayek v. Hayek and United States*, No. 7400-W, all decided in the District Court of the

United States for the Southern District of California; and by the Superior Court of the State of California in and for the County of Los Angeles, in *Nobles v. Cannell*, No. 502,587 (Appendix p. xxiii, Appellant's Brief in Opposition to Motion of Appellee for Affirmation of Judgment of State Court and Dismissal of Appeal). There are no Federal Court decisions to the contrary of which we are aware.

When the *Pack* case was appealed, 176 Fed. (2d) 770, the Court refused to pass on the question involved in the case at bar. It affirmed the judgment of the lower court so far as the United States was concerned but held that the provisions of the Act as to settlement of claims did not authorize the Federal District Court to determine the controversy between the widow and her deceased husband's mother.

We believe the court was painfully aware of the doctrine of comity and being unable to conscientiously agree with the lower court in the case at bar avoided the issue by deciding the case before it on another ground.

B. Federal law controls payment of the proceeds of a National Service Life Insurance policy.

Under the provisions of Section 602 (g) (38 U.S. C.A. Sec. 802 (g)), the insured had the right to designate the beneficiary of his National Service Life Insurance contract within a restricted class of beneficiaries, and the right to change the beneficiary, without the beneficiary's consent. The section reads as follows:

"(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: * * *"

This was one of the important provisions of the contract[39] which the insured entered into with the United States when he applied for National Service Life Insurance, and without any change having been made during his lifetime controls the payment of insurance benefits.

Under Government insurance contracts, the only relations of contract are between the Government and the insured, the beneficiary being a volunteer. *White v. United States*, 270 U.S. 175, supra; *Von Der Lippi-Lipski v. United States*, 4 F. (2d) 168 (App. D.C.) infra; *United States v. Sterling*, 12 F. (2d) 921 (C.C.A. 2) infra. As stated in *White v. United States*, supra (pp. 180-181):

"The only relations of contract were between the Government and him. White's mother's in-

[39]The contract provisions are found in the Act, the amendments thereto and the regulations promulgated thereunder. *White v. United States*, 270 U.S. 175; *Lynch v. United States*, 292 U.S. 571; *Wilner v. United States*, 292 U.S. 571.

terest at his death *was vested* only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more. See Helmholz v. United States, 294 Fed. 422, affirming 290 Fed. 614." (Emphasis ours.)

Appellee, who admittedly was not designated as beneficiary, had no relations of contract with the Government and could occupy no better position than the named beneficiary.

So in *Washburn v. United States*, 63 Fed. Supp. 224, where the proceeds were payable to the wife as primary beneficiary and the sister of the insured as contingent beneficiary and the wife died leaving a son shortly after the insured died the Court said:

"It will not be disputed, I am sure, that it is a well established principle of law that where a beneficiary survives the insured, however short the length of time may be between the death of the insured and that of the beneficiary, the rights of a 'contingent' beneficiary are lost, and that upon the death of the insured, the benefits immediately become due to the surviving principal beneficiary. (Citing cases.)

"With that principle of law in mind, if the facts in this case had arisen under an ordinary life insurance policy, there could be no question but that immediately upon the death of the insured, the right to the insurance would have vested in the 'principal' beneficiary, his wife, and that

the 'contingent' beneficiary would have acquired no interest in the benefits, *but in this case the insurance was provided for by a special Act of Congress, for those in the Armed Forces, and we must find the answers to our questions within the Act itself.*" (Italics ours.)

The Court then holds that the sister, the "contingent" beneficiary, is entitled to the insurance in spite of the state rule of law to the contrary.

Similarly a State Court consent decree is invalid as a violation of the federal act prohibiting assignments, *Robertson v. McSpadden*, 46 Fed. (2d) 702. An agreement to divide the proceeds is invalid. *Von Der Lippi-Lipski v. United States*, 4 Fed. (2d) 168; *Lewis v. United States*, 56 Fed. (2d) 563; *Murphy v. United States*, 5 Fed. Supp. 583, where the Court said:

"(3) Plaintiff's second ground of recovery appears to resolve itself into a *pure question of law*. He testified that, after his son's term insurance had expired for the non-payment of premiums, he furnished money for it to be reinstated, and that he had paid the premiums on the life insurance policy since it was issued. There is conflicting testimony as to whether or not such was the fact. It is not necessary for me to make a finding one way or the other in order to determine plaintiff's right in this case. Whether or not the father may *prove a claim against his son's estate* for money so expended is a question for the state Court. *An agreement not to change beneficiary in a war risk policy in consideration of money advanced to insured by beneficiary is invalid.*" (Italics ours.)

A gift of the policy followed by payment of the premiums by the donee does not prevent a change in beneficiary by the insured and the new beneficiary is entitled to the proceeds as against the donee. *United States v. Sterling*, 12 Fed. (2d) 921; *Tompkins v. Tompkins*, 132 N.J.L. 217, 38 Atl. (2d) 890.

C. Federal law protects the named beneficiary in the use of the proceeds although state rules of law would authorize others to take the proceeds from the named beneficiary.

The provisions of the federal act directly involved in this case are found in Section 3, 49 Statutes 609, 38 U.S.C.A., Section 454 A, Act of August 12, 1934, Chapter 510:

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary". (Emphasis ours.)

The provisions of this section against assignments have been upheld in *Robertson v. McSpadden*, supra; *Bradley v. United States*, supra; *Von Der Lippi-Lipski v. United States*, supra; *Lewis v. United States*, supra; *Murphy v. United States*, supra; *United States v. Sterling*, supra; *Tompkins v. Tompkins*, supra; and *Kauffman v. Kauffman*, 93 A.C.A. 966, ... Pac. .....

The provisions of this section exempting the proceeds from taxation were upheld in *Lawrence v. Shaw*,

300 U.S. 245, and considered not applicable to the situation presented in *United States Trust Co. of New York v. Helvering*, 307 U.S. 57.

The exemption from the claims of creditors was followed in *Culp v. Webster*, 25 Cal. App. (2d) Supp. 759, 70 P. (2d) 273. In *Pagel v. Pagel*, 291 U.S. 473, it was held under the previous wording of this section that this exemption did not extend to the funds after they became a part of the estate of the assured and the Congress immediately thereafter broadened the language to cover that situation. *In re McCormick's Estate*, 8 N.Y.S. (2d) 179, 185-188, *Haley v. United States*, 46 F. Supp. 4, 7. See also *Carrier v. Bryant*, 306 U.S. 545, 548.

VII.

THE CONGRESS HAS CLEARLY EXPRESSED ITS INTENTION THAT THE DEAD SOLDIER'S WISHES SHALL BE RESPECTED AND THE BENEFICARY WHOM HE NAMES SHALL BE PROTECTED IN THE USE OF THE PROCEEDS OF THE INSURANCE ON HIS LIFE.

We are determining the right of a deceased veteran to leave the proceeds of his insurance to his mother and father rather than to his widow from whom he was estranged. (Tr. 21.) We are interpreting a contract between the veteran and his government.

The terms of the contract are contained in acts of the Congress and regulations promulgated thereunder. *White v. United States*, 270 U.S. 175; *Lynch v. United States*, 292 U.S. 571; *Wilner v. United States*, 292 U.S. 571.

These acts provide: "The insured shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries." (National Service Life Insurance Act of 1940, Section 602 (g), 38 U.S.C.A. Sec. 802 (g)).

The Courts in determining the beneficiary have carried out the intention of the assured and have ignored formalities to do so. *Mitchell v. United States* (C.C.A. 5, 1948), 165 Fed. (2d) 758, 2 A.L.R. (2d) 484 annotated.

The annotater at 2 A.L.R. (2d) 494 says:

> "All the cases agree that the controlling feature as to the effectiveness of a change of beneficiary by the insured under a policy of national service life insurance is the real intention of the insured with regard to such change, as against failure to comply with all the formalities for making his purpose effective.
>
> "Thus, it was said in Woods v. United States (1947; D.C. Ala.) 69 F. Supp. 760, that the intention of the deceased soldier should, if it can reasonably be done, be given effect by the courts, and substance rather than form should be the basis of the decisions of the courts.
>
> "Similarly, it was said in Citron v. United States (1947; D.C. Dist. Col.) 69 F. Supp. 830, that it is an avowed purpose of the law that the intention of a soldier with respect to the designation of a beneficiary of insurance shall be ascertained and carried into effect.

"Another formulation of the same basic principle is the statement frequently found in the decisions that the courts will brush aside all legal technicalities in order to effectuate the manifest intention of the insured. This language was used in the following cases: Bradley v. United States (1944; C.C.A. 10th Okla.) 143 F. (2d) 573 (cert. den. (1945) 323 U.S. 793, 89 L. ed. 632, 65 S. Ct. 429); Roberts v. United States (1946; C.C.A. 4th Va.) 157 F. (2d) 906 (cert. den. Roberts v. Roberts (1947) 330 U.S. 829, 91 L. ed. 1278, 67 S. Ct. 870); Collins v. United States (1947; C.C.A. 10th Okla.), 161 F. (2d) 64 (cert. den. (1947) 331 U.S. 859, 91 L. ed. 1866, 67 S. Ct. 1756); Mitchell v. United States (1948; C.C.A. 5th La.) 165 F. (2d) 758, 2 A.L.R. (2d) 484; Woods v. United States (1947; D.C. Ala.) 69 F. Supp. 760; Rutledge v. United States (1947; D.C. La.) 72 F. Supp. 352 (aff'd Mitchell v. United States (1948; C.C.A. 5th), 165 F. (2d) 758, 2 A.L.R. (2d) 484)."

The insured in the case at bar designated his parents as beneficiaries and wanted them to have the benefits from the insurance on his life. (Tr. 3.)

The Act also provides:

"Payments of benefits * * * made to * * * a beneficiary * * * shall be exempt from taxation, shall be exempt from the claims of creditors, *and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."[40] (Emphasis ours.)

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[40]Sec. 3, 49 Stat. 609 (38 U.S.C.A. Sec. 454A), Act of August 12, 1934, Chapter 10. Made applicable to National Service Life Insurance by Sec. 617, Act of Oct. 8, 1940, 54 Stat. 1014 (38 U.S. C.A. Sec. 817), Appendix pages ii and xiv.

Under the well known rule of statutory construction every word and phrase must be given some useful meaning if that is possible. When the statute says that "payments made to a beneficiary shall be exempt from taxation, shall be exempt from the claims of creditors, *and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever", the words "*and* shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever" add new exemptions to the exemptions from taxation and the claims of creditors already stated.

Congress intended a veteran to have the right to say to whom the proceeds of his insurance should be paid and that that person should be able to use those proceeds free from taxation, free from the claims of creditors, *and* free from the claims of any other person such as a wife from whom he was estranged.

The only claims that could be made against proceeds of an insurance policy are claims of the state by taxation, claims of creditors *and* claims of relatives by blood or marriage. The Congress said that none of these claims could be asserted either before or *after* receipt of the payments by the beneficiary.

The Court below being unable to avoid the clear meaning of the language used and being otherwise unable to avoid the intention of the Congress and the deceased soldier and to apply the state rules of community property rather than the rules in the federal statute as required by the supremacy clause of the United States Constitution[1] held the Act of Con-

[1] United States Constitution, Article VI, paragraph 2.

gress unconstitutional and thereby deprived appellants of their property without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

CONCLUSION.

Among the powers delegated to the Congress by the people in the Constitution of the United States are the powers to provide for the common defense and general welfare of the United States, to raise and support armies, to provide and maintain a Navy and to make rules and regulations for the governing and regulation of the land and naval forces. The Congress is also given the power to make all laws which shall be necessary and proper for carrying into execution the previously, expressly granted powers. This necessary and proper clause is not a limitation on the exercise of the expressly delegated powers but is a further grant of power. An Act of the Congress passed pursuant to expressly delegated powers is not in violation of the Tenth Amendment or the due process clause of the Fifth Amendment but becomes the supreme law of the land and the judges in the courts of every state are bound thereby.

The constitutionality of the provisions of the National Service Life Insurance Act of 1940, involved in this case, have been sustained against every attack that has been made on them in every reported case of which we have knowledge, except the case at bar.

There is a conflict between the State and Federal courts sitting in the State and between the lower

Court and the Courts in other states and Federal jurisdiction which can only be resolved by decision of this Court.

The question is a novel one so far as this Court is concerned. It is one of great importance to thousands of people. The possibilities of increase in litigation, if the judgment of the lower Court is not reversed, are tremendous. This Court has jurisdiction, both certiorari and by appeal.

The provisions of the Act indicate an intention by the Congress to establish a uniform system of insurance completely covering the area of the controversy in the case at bar in words whose meaning, as applied to the facts in this case, cannot be questioned. The action of the lower Court in applying state rules of law instead of the applicable rules of the Federal statute in conflict therewith has deprived appellants of their property without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution, for which action the judgment of the lower Court should be reversed and appellants awarded their costs incurred.

Dated, Modesto, California,
November 18, 1949.

Respectfully submitted,

W. Coburn Cook,
Vernon F. Gant,
Carlos J. Badger,
Counsel for Appellants.

(Appendix Follows.)

STATUTES

Pensions, Bonuses, Veteran's Relief.

38 U.S.C.A. Sec. 445. "Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions.

"In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28, and section 765 of Title 28 so far as applicable. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Veterans' Administration acknowledges the indebtedness of the United States upon any such contract of insurance and there is a

dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought by the Veterans' Administration in the name of the United States against all persons having or claiming to have any interest in such insurance in the Supreme Court of the District of Columbia or in the district court in and for the district in which any such claimants reside: * * *

The term 'claim', as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veterans' Affairs or someone acting in his name on an appeal to the Administrator. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter. June 7, 1924, c. 320, 19, 43 Stat. 612; Mar. 4, 1925, c. 553, 2, 43 Stat. 1302; May 29, 1928, c. 875, 1, 45 Stat. 964; July 3, 1930, c. 849, 4, 46 Stat. 992; July 3, 1930, c. 863, 1, 2, 46 Stat. 1016; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921."

38 U.S.C.A. 454a. "Assignability and exempt status of payments of benefits.

"Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relat-

ing to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. * * * *Provided further*, That nothing in this amendatory Act shall be construed to modify or repeal section 687b of this title. Aug. 12, 1935, c. 510, 3, 49 Stat. 609; Oct. 17, 1940, c. 893, 5, 54 Stat. 1195, as amended."

38 U.S.C.A. 802. "Persons insurable; premiums; type of insurance; benefits and beneficiaries; effective date and amount of insurance—Persons entitled to insurance; persons entering service.

"(a) Every person who is commissioned and hereafter ordered into, or who is hereafter examined, accepted, and enrolled in, the active service and while in such active service shall, upon application in writing (made within one hundred and twenty days after entrance into such active service) and payment of premiums as hereinafter provided and without further medical examination, be granted insurance on the five-year-level premium term plan by the United States against the death of such person occurring while such insurance is in force.

"(d) (2) Any person in the active service on or after October 8, 1940, who, while in such service and before the expiration of one hundred and twenty days after December 20, 1941, dies or has died in line of duty (including death resulting from disease or injury incurred in line of duty), without having in force

at the time of such death insurance under sections 287, 357, 502, and 575 of this title, chapter 10 of this title, or this chapter, in the aggregate amount of at least $5,000, shall be deemed to have applied for and to have been granted insurance as of the date of entry into active service or October 8, 1940, whichever is later, in the sum of $5,000 payable as provided in section 802 (h), except that payments hereunder shall be made only to the following beneficiaries and in the order named—

(A) to the widow or widower of the insured, if living and while unremarried;

(B) if no widow or widower entitled thereto, to the child or children of the insured, if living, in equal shares;

(C) if no widow or widower entitled thereto, or child, to the dependent mother or father of the insured, if living, in equal shares.

"(d) (3) Any person in the active service on or after October 8, 1940, who, while in such service and before the expiration of one hundred and twenty days after December 20, 1941, suffers in line of duty total disability continuously for six months or more without having in force at the time of such disability insurance under sections 287, 357, 502, and 575 of this title, chapter 10 of this title, or this chapter, in the aggregate amount of at least $5,000, shall be deemed to have applied for and to have been granted insurance in the aggregate sum of $5,000 effective as of the date such disability was so suffered but not

prior to October 8, 1940. Such premiums shall be waived during the continuation of such total disability. The Administrator is authorized and directed to transfer from the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to cover all losses incurred and premiums waived under paragraphs (2) and (3) of this subsection.

"(e) The premium rates for such insurance shall be the net rates based upon the American Experience Table of Mortality and interest at the rate of 3 per centum per annum. All cash, loan, paid up, and extended values, and all other calculations in connection with such insurance, shall be based upon said American Experience Table of Mortality and interest at the rate of 3 per centum per annum.

"(f) Such insurance shall be issued upon the five-year level premium term plan, with the privilege of conversion as of the date when any premium becomes or has become due, or exchange as of the date of the original policy, upon payment of the difference in reserve, at any time after such policy has been in effect for one year and within the five-year term period, to policies of insurance upon the following plans: Ordinary life, twenty payment life, thirty payment life. All five-year level premium term policies shall cease and terminate at the expiration of the five-year term period. Provisions for cash, loan, paid up, and extended values, dividends from gains and savings, refund of unearned premiums, and such other provisions as may be found to be reasonable

and practicable, may be provided for in the policy of insurance or from time to time by regulations promulgated by the Administrator.

"(g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided.

"(h) Such insurance shall be payable in the following manner:

(1) If the beneficiary to whom payment is first made is under thirty years of age at the time of maturity, in two hundred and forty equal monthly installments.

(2) If the beneficiary to whom payment is first made is thirty or more years of age at the time of naturity, in equal monthly installments for one hundred and twenty months certain, with such payments continuing during the remaining lifetime of such beneficiary.

(3) Any installments certain of insurance remaining unpaid at the death of any beneficiary shall be

paid in equal monthly installments in an amount equal to the monthly installments paid to the first beneficiary, to the person or persons then in being within the classes hereinafter specified and in the order named, unless designated by the insured in a different order—

(A) to the widow or widower of the insured, if living;

(B) if no widow or widower, to the child or children of the insured, if living, in equal shares;

(C) if no widow, widower, or child, to the parent or parents of the insured, if living, in equal shares;

(D) if no widow, widower, child, or parent, to the brothers and sisters of the insured, if living, in equal shares.

"(i) If no beneficiary is designated by the insured or if the designated beneficiary does not survive the insured, the beneficiary shall be determined in accordance with the order specified in subsection (h) (3) of this section and the insurance shall be payable in equal monthly installments in accordance with subsection (h) (1) or (2), as the case may be. The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the per-

mitted class next entitled to priority, as provided in subsection (h).

"(j) No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made.

"(m) The Administrator shall, by regulations, prescribe the time and method of payment of the premiums on such insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from his active service pay or be otherwise made: *Provided,* That an amount equal to the first premium due under a national service life-insurance policy may be advanced from current appropriations for active service pay to any person in the active service in the Army, Navy, Marine Corps, or Coast Guard, which amount shall constitute a lien upon any service or other pay accruing to the person for whom such advance was made and shall be collected therefrom if not otherwise paid: *Provided further,* That no disbursing or certifying officer shall be responsible for any loss incurred by reason of the advance herein authorized: *And provided further,* That any amount so advanced in excess of available service or other pay shall constitute a lien on the policy within the provisions of section 454a of this title.

"(n) Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during continuous total disability of the insured which commenced subsequent to the effective date of such insurance and which has existed for six consecutive months or more prior to the attainment by the insured of the age of sixty years, effective as of the due date of the monthly premium becoming payable on or after the first day of the seventh consecutive month of such disability: *Provided*, That application for waiver is made while the insurance is currently kept in force by the payment of premiums, and the insured furnishes proof satisfactory to the Administrator showing that he is and has been continuously totally disabled for six or more months prior to attaining sixty years of age. Any waiver granted by the Administrator under this subsection shall not become effective prior to the date of application therefor; except that, in the discretion of the Administrator, it may be made effective at any time within a period of not more than six months prior to such date but in no event prior to the first day of the seventh month of such continuous disability. Any premiums tendered to cover a period during which such waiver is effective shall be refunded. The Administrator shall provide by regulations for reexaminations of beneficiaries under this subsection and, in the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of

insurance may be continued by payment of premiums as provided in said policy. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof."

804. Appropriations for payment of liabilities; payments from.

"There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to carry out the provisions of this chapter, to be known as the National Service Life Insurance appropriation, for the payment of liabilities under National Service Life Insurance. Payments from this appropriation shall be made upon and in accordance with awards by the Administrator." Oct. 8, 1940, 11 P.M., E.S.T. c. 757, Title VI, Part I, Sec. 604, 54 Stat. 1011."

805. National Service Life Insurance Fund; creation; payments into and from; reserves; investments.

(a). "There is hereby created in the Treasury a permanent trust fund to be known as the National Service Life Insurance Fund. All premiums paid on account of National Service Life Insurance shall be deposited and covered into the Treasury to the credit of such fund, which, together with interest earned thereon, shall be available for the payment of liabilities under such insurance, including payment of dividends and refunds of unearned premiums. Payments

from this fund shall be made upon and in accordance with awards by the Administrator.

(b). "The Administrator is authorized to set aside out of such fund such reserve amounts as may be required under accepted actuarial principles, to meet all liabilities under such insurance; and the Secretary of the Treasury is hereby authorized to invest and reinvest such fund, or any part thereof, in interest-bearing obligations of the United States or in obligations guaranteed as to principal and interest by the United States, and to sell such obligations for the purposes of such fund. Oct. 8, 1940, 11 p.m. E.S.T., c. 757, Title VI, Part I, Sec. 605, 54 Stat. 1012.

806. Administrative costs.

"The United States shall bear the cost of administration in connection with this chapter, including expenses for medical examinations, printing and binding, and for such other expenditures as are necessary in the discretion of the Administrator. The appropriations made for the Veterans' Administration for the fiscal year 1941 for administrative expenses shall be available for the payment of such costs of administration under this chapter. Oct. 8, 1940, 11 p.m. E.S.T., c. 757, Title VI, Part I, Sec. 606, 54 Stat. 1012."

807. Costs of excess mortality and premium waiver; liability for benefits for death resulting from extra hazard of military or naval service.

(a) The United States shall bear the excess mortality cost and the cost of waiver of premiums on account total disability traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator.

(b) Whenever benefits under such insurance become payable because of the death of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the liability for payment of such benefits shall be borne by the United States in an amount which, when added to the reserve of the policy at the time of death of the insured, will equal the then value of such benefits under such policy. The Administrator is authorized and directed to transfer from time to time the National Service Life Insurance appropriation to the National Service Life Insurance Fund such sums as may be necessary to carry out the provisions of this section.

(c) Whenever the premiums under such insurance are waived as provided in section 802(n) because of the total disability of the insured as the result of disease or injury traceable to the extra hazard of military or naval service, as such hazard may be determined by the Administrator, the premiums so waived shall be paid by the United States and the Administrator is authorized and directed to transfer from time to time an amount equal to the amount of such premiums from the National Service Life Insurance appropriation to the National Service Life

Insurance Fund. Oct. 8, 1940, 11 p.m., E.S.T., c. 757, Title VI, Part I, Sec. 607, 54 Stat. 1012."

808. General administrative provisions.

"The Administrator, subject to the general direction of the President, shall administer, execute and enforce the provisions of this chapter, shall have the power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder. All officers and employees of the Veterans' Administration shall perform such duties in connection with the administration of this chapter as may be assigned to them by the Administrator. All official acts performed by such officers or employees designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person. Except in the event of suit as provided in section 817 hereof, all decisions rendered by the Administrator under the provisions of this chapter, or regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by motion or otherwise any such decision. Oct. 8, 1940, 11 p.m., E.S.T., C. 757, Title VI, Part I, Sec. 608, 54 Stat. 1012."

810. Establishment of death: presumptions.

"No State law providing for presumption of death shall be applicable to claims for National Service Life Insurance. If evidence satisfactory to the Ad-

ministrator is produced establishing the fact of the continued and unexplained absence of any individual from his home and family for a period of seven years, during which period no evidence of his existence has been received, the death of such individual as of the date of the expiration of such period may for the purposes of this chapter, be considered as sufficiently proved. Oct. 8, 1940, 11 p.m., E.S.T., c 757, Title VI, Part I, Sec. 610, 54 Stat. 1013."

816. Application of other laws.

"The provisions of sections 101-104, 131-134, 450, 454a, and 556a of this title, insofar as they are applicable, shall apply to the provisions of this chapter. Oct. 8, 1940, 11 p.m., E.S.T., c 757, Title VI, Part I, Sec. 616, 54 Stat. 1014."

817. Suits in event of disagreement as to claims.

"In the event of a disagreement as to claim arising under this chapter, suit may be brought in the manner and subject to the same conditions and limitations as are applicable to United States Government (converted) life insurance under the provisions of sections 445 and 551 of this title, as amended: *Provided*, That in any such suit the decision of the Administrator as to waiver or non-waiver of premiums under section 802(n) shall be conclusive and binding on the court. Oct. 8, 1940, 11 p.m., E.S.T., c 757, Title VI, Part I, sec. 617, 54 Stat. 1014."

818. Short title.

"This chapter may be cited as the 'National Service Life Insurance Act of 1940.' Oct. 8, 1940, 11 p.m.

E.S.T., c 757, Title VI, Part I, Sec. 618, 54 Stat. 1014."

Civil Code of California

Sec. 172. Management of community personal property. "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.—1917:829."

Sec. 172a. Management of community real property. *Limitation of actions.* "The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a

lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.—1927:827."

Statement Opposing Jurisdiction and Motion to Dismiss or Affirm

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET V. WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

LESLIE A. CLEARY,
Attorney for Appellee.

CLEARY AND ZEPP,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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Appellee

APPEAL FROM THE DISTRICT COURT OF APPPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

STATEMENT DISCLOSING MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THIS COURT ASSERTED BY APPELLANTS

Comes now Margaret V. Wissner, appellee herein and, in accordance with the provisions of paragraph 3, rule 12 of the rules of the Supreme Court of the United States, presents her typewritten statement disclosing matters and grounds making against the jurisdiction of this Court asserted by the appellants and files her motion to affirm the judgment and final decision of the California District Court of Appeal, Third Appellate District and the judgment

and final decision of the Supreme Court of the State of California denying a hearing after decision in the Appellate Court.

I

Facts

The facts to be considered in this matter are established by the findings of fact made and filed by the Honorable B. C. Hawkins, Judge of the Superior Court of the State of California in and for the County of Stanislaus at the close of the trial of said action in said court.

A summary of the pertinent facts therein found by the judge of the lower court is as follows:

a. Margaret V. Wissner and Leonard O. Wissner were married in the State of California on August 16, 1930, and continued as husband and wife and continued at all times as residents of and domiciled in the State of California up to the date of death of the said Leonard O. Wissner.

b. Leonard O. Wissner died testate while serving as a major in the United States Army on November 14, 1945.

c. During service, Leonard O. Wissner purchased from the United States government a national service life insurance policy in the principal sum of $10,000.00, which policy matured and was payable on his death on November 14, 1945; that the appellee did not, at the time of the purchase of said policy nor any time prior to his death, know that the said Leonard O. Wissner had named anyone other than herself as beneficiary and that she, the said appellee, did not at any time consent to the naming of anyone but herself as beneficiary under said policy and that said appellee did not, at any time, consent to the application or use of community funds to or for the payments of premiums on said insurance policy and that the naming of said ap-

pellants and each thereof as beneficiaries under said policy was without consideration.

d. That at the time of the issuance of the said policy of insurance to said Leonard O. Wissner and during all of the time thereafter up to the time of his death, he and the appellee, Margaret V. Wissner were both, at all times, legal residents and domiciled in the State of California; that the premiums on said insurance policy and the whole thereof were paid from the earnings of the said Leonard O. Wissner and the earnings of the said Leonard O. Wissner, from which said premiums were paid, were the community property of Leonard O. Wissner and Margaret V. Wissner, his wife, appellee herein.

e. That the proceeds of said insurance policy were and are the community property of appellee Margaret V. Wissner and the deceased Leonard O. Wissner.

All of the above stated facts will be found in the findings of the court—C. T. page 30, line 17 to C. T. page 32, line 5.

f. That the said policy of insurance was paid for with the community property of appellee and the deceased, Leonard O. Wissner, is alleged in the original complaint (C. T. page 5, line 2 to 8) and is admitted by the answer of the appellants (C. T. page 18, lines 10 to 25). It will be noted that in the answer of appellants they allege only that the premiums were paid from the pay of the deceased as an officer in the army, making no denial of the allegation of the appellee, in her complaint, that the earnings were community property.

II

The United States Was Not a Party to This Case, Was Not Affected by the Decision and Has No Interest in It

a. United States not a party: It seems advisable that we should call attention, very specifically, to the fact that this

case differs from all others that have been under consideration by any court of last resort or any of the lower Federal courts.

In all such previous cases the suit has included the United States or a Federal official or department as a defendant.

In this case we have always taken the position that State courts cannot interfere with the acts of the veterans' bureau or any official of the United States government in connection with the insurance program.

Our position in this case, which sets it wholly and completely apart from the contentions made in all other cases reviewed in the higher courts, is that a State court cannot interfere with the carrying out of the veterans' insurance program to the full measure as provided by the Congressional Act, but that this does not preclude the State court from entertaining litigation between citizens of the State over the proceeds of a veteran's insurance policy after they are in the hands of the beneficiary unless such litigation concerns some specific exemption set forth in the Congressional Act.

b. United States not affected by the decision: The Congressional Act setting up the veterans' insurance program has for its purpose the protection of the veteran throughout his lifetime and after his death. Every act necessary to be performed by any representative of the government can be performed without embarrassment, hindrance or difficulty under the decision appealed from. The purposes of the Act can be and will be fully and completely carried out in accordance with the language of the Act under this decision.

A holding contrary to the decision approved by the Appellate Court and the Supreme Court of the State of California would require reading into the Act language which is not there.

c. United States not interested in this litigation: This decision of the California Appellate and Supreme Courts deals only with the rights of the state courts to settle disputes with reference to insurance benefits paid to the beneficiary concerning matters not specifically exempted under the Congressional Act and recognizes fully the fact that Federal agencies cannot be interfered with in completing all their duties up to and including the payment of the benefits due, under the insurance, to the beneficiary named by the insured. Nothing in the decision, in any way, changes or affects the rights or duties of the Federal government and its agents from the very inception of any soldier's insurance program to the performance of the last act, namely the payment of the benefits to the beneficiary.

III

The Validity of the Congressional Act Providing for National Service Life Insurance Is Not Questioned

The decision of Justice Adams merely points out that if courts endeavor to read into the act language which is not there it would deprive wives of soldiers, in community property states, of their vested property interests. Such an extension of the act by judicial decision would be invalid under the Fifth Amendment to the United States Constitution.

It would seem, therefore, that unless this Court desires to enlarge the scope of the Congressional pronouncement, there is no Federal question involved.

IV

Appellants Stand or Fall on Section 454A of Veterans' Relief Act

a. Entire argument for jurisdiction of this Court depends on their interpretation of the above section: No other Fed-

eral statute is involved and we respectfully suggest that if the language of Section 454A, on which they place reliance, is not violated by the decision of Justice Adams, this court does not have jurisdiction.

Analyzing the position of appellants further, with reference to the jurisdiction of this Court, they pin their entire hope and argument to three lines of Section 454A, namely,

> "and benefits shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".

These lines appellants emphasize, but we again suggest to this Court that the three lines emphasized by the appellants cannot be taken out of the Congressional Act and read and interpreted without relation to the remaining provisions of the Act. We think it is necessary to read the preceding language of the section, namely,

> "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary".

It is to be observed, first, that Congress did not say in the Act that vested property rights recognized and established by the laws of any state in the proceeds of such insurance, either before or after receipt by the beneficiary, shall not apply.

Appellants must necessarily take the position, to sustain their point, that the lines which they underscore mean that no court can touch payments made under veterans' insurance either before or after receipt by the beneficiary by

any process of any kind or character whatsoever. If they cannot sustain this position and if this Court is not willing to so hold, appellants are obviously standing on a frail support that cannot possibly bear the weight of establishing the jurisdiction of this Court.

b. Payments of insurance are subject to legal and equitable process: Certainly it is established by the decisions of many courts that legal and equitable process will reach benefits paid under veterans' insurance both before and after they reach the beneficiary where questions of alimony, support of children and like matters are involved.

Gaskins v. *Security Bank*, 30 C. A. (2d) 409 85 Pac. (2d) 681, 685.

> "the beneficent purpose manifested in the act of Congress is to preserve the disabled soldier's fund against imposition on the part of designing people or depletion by the soldier's own improvidence . . ., but we cannot conceive that it was the purpose of the government to prevent the probate courts in guardianship proceedings from authorizing the application of these funds to the needs of the veteran's children . . . The obligation of a father to support his minor children is *not a debt* contemplated by this act of Congress, but is an obligation growing out of the parental status and public policy . . . .".

This court cited *Guardianship of Giambastiani*, 1 Cal. App. (2d) 639 (37 Pac. (2d) 142) where the claim of a guardian of a veteran for moneys advanced for him was approved and the court said:

> "A claim of a de facto guardian for expenditures on behalf of the ward, set up in his subsequent accounting, is *not the claim of a creditor.*"

In *re Flanagan*, 31 Fed. Sup. 402. Here the divorced wife of a lunatic veteran sought the payment of alimony from

funds received by him as disability compensation. The court held that the provisions of 38 U.S.C.A. Sec. 454a did not exempt the veteran from the wife's claim and the court said:

> "The judgment for alimony is not a debt in the ordinary sense. It is an obligation of a higher order . . . the purposes of the exemptions in this (case) were to protect not only the recipient of the benefits but to afford some degree of security to the family and dependents of such recipient. The enactment of these statutes had as their purpose, at least in part, to insure the public against the pauperism of the recipient of the benefits or that of his dependents. A divorced wife is a dependent no less in the status created by the divorce decree than in that fixed by the marriage bond. Congress did not intend to put such benefits beyond the reach of a divorced wife."

This case cites *Schlaefer* v. *Schlaefer*, 112 Fed. Rep. 2d 177, in which later case the opinion was written by Justice Rutledge and construed section 16a of the life insurance act of the District of Columbia which provided that:

> "No money or other benefit paid, provided, allowed, or agreed to be paid by any company on account of the disability from injury or sickness of any insured person shall be liable to execution, attachment, garnishment, or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law, to pay any debt or liability of such insured person . . ."

In writing the opinion Judge Rutledge said:

> "The basic issue boils down to whether Congress intended to relieve the disabled insured to the extent of his disability payments from legally enforceable obligation to support his family and those legally dependent upon him. So far as general creditors are concerned the purpose is clear . . .

> An important, often the primary, motivation for taking out disability insurance is protection of the family, not merely of its supporter. As has been said, the funds are not earmarked for limited and particular purposes. They are derived normally from the insured's earning power . . . By law and the most sacred contract he is obligated to employ it, while it exists, for dependents' support . . . The obligation on which appellant's claim is based is not a "debt" or a "liability" in the ordinary usages of those terms. It is a duty of higher obligation. As has been said, it is not one within the usual purposes of exemption statutes."

Hannah v. *Hannah*, 11 S.E. 2d 779, 781: This case involved a claim for alimony and support by the wife against her husband, then 79 years of age, who was receiving $45.00 per month from the United States government as a result of the death of a son by his first wife in military service. The court noted that these funds were protected by the provisions of 454a and called particular attention to the phrase in said section which reads "and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever". The court then said:

> "We do not, however, view this additional language as extending the exemption beyond the claims of creditors and to thereby cover the claim of the character of alimony."

Stirgus v. *Stirgus*, 160 S. 285 holds that the word "creditors" in section 454, now section 454a, contemplates an ordinary contractual obligation of statutory debt and not a claim arising by operation of law.

In the above cases, and many others that could be cited, the limits of the exemptions set forth in section 454a, or its predecessor 454, were being considered. In each case the conclusion arrived at by the court was that the rights

of a wife to alimony, or of a child to support, or the right of a guardian for reimbursement was not a debtor-creditor relationship and that the provisions of section 454a did not prohibit the enforcement of such rights by state courts.

It appears well established, therefore, that the language of Section 454a does not mean what appellants contend for. The cases mentioned hold that not only are the funds subject to the process of courts of both law and equity in the hands of the beneficiary, but they are likewise subject to such process and may even be sequestered in the hands of the veteran or before they reach his hands.

It is admitted in this case, that the proceeds of the insurance policy in question were community property under the California law.

It is pointed out by Justice Adams in the decision in question that under the provisions of the California Civil Code, section 161a the wife has a vested interest in one-half of community property. (Page 18 of Jurisdictional Statement.) Section 161a of the California Civil Code reads as follows:

> "(Interests in community property.) The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

The community property laws of the eleven states that now enjoy them, have always been recognized by the Federal government—a notable instance being in connection with the separate returns of husband and wife in income tax matters.

If the funds referred to in section 454a are subject to seizure and other process for alimony and in guardianship and child support matters it naturally follows that in the event of a divorce the funds which are community property would be subject to division by the state court between the husband and wife. In other words, the division of a $10,000.00 policy between the husband and wife would be nothing more than turning over to her the property that belonged to her.

It appears to us that the provisions of section 454a are intended to protect the funds in question from creditors and from claims of those hostile to the veteran and his family. The language of the section itself seems to be intended for this purpose and in the section it is to be noted that Congress uses the word "claims" on two occasions. First saying that the funds "shall be exempt from the *claims* of creditors", and again saying "such provisions shall not attach to *claims* of the United States . . .". The processes referred to, namely, attachment, levy, seizure or any process of court are designed to enforce claims of creditors.

A wife in asserting her right to recover her vested property is in no sense a creditor.

Congress amended this act in 1935 as a result of the decision in *Pagel* v. *Pagel*, 291 U. S. 473, 54 Supreme Court 497. This amendment only extended the exemption against claims of creditors to the funds *after they left the hands of the insured and became a part of his estate*, and broadened the language slightly. *At this time the question of the meaning and extent of the exemption under the act certainly was brought clearly and fully to the attention of Congress. We again respectfully suggest that the failure of Congress, at that time, to place in the act any words destroying vested community property rights shows rather clearly that no such intention existed.*

The vested community property rights of women in these soldiers' policies undoubtedly run into millions and millions of dollars and affect hundreds of thousands, if not millions of women. Surely had Congress intended the destruction of these rights it would not have left that destruction to extension of the phraseology of the act by judicial construction.

In this case the appellee continued to work at her profession as a trained nurse long after her marriage to the deceased Leonard O. Wissner, earning the money to permit him to complete his education. (Page 17 of Jurisdictional Statement.) She had not only the legal claim to one-half the insurance because it was her vested property under the laws of California, but she had the moral right to it because her efforts had contributed so largely to the situation of her husband which permitted him to obtain the rank of major in the armed services. He could freely give his half of the community property, as an unexpected gift, to his parents but surely, *the United States government never intended to enter into a secret agreement with a husband by which he could deprive his wife of her property. Surely Congress never intended any such result.*

As we previously pointed out, unless this intent is in the act of Congress, the appellants' one argument for the jurisdiction of this Court falls.

V

Supreme Court of the United States Limits Provisions of Section 454a

We are not without authority from this Court for limitation on the exemptions set forth in section 454a. This matter was before Your Honors in the case of *United States Trust Co. of New York* v. *Helvering*, 307 U. S. 57,

83 L. Ed. 1104. The question before the court at that time was whether or not the proceeds of a veteran's insurance policy, in the sum of $10,000.00 paid to the widow, should be included in the estate for the purpose of determining the federal estate tax.

The claim was made that since the World War Veterans' Act of 1924 contained the provision that insurance payments thereunder "shall be exempt from all taxation", and the amendment thereto in 1935 did not significantly change the situation, the proceeds of the insurance policy should not be included in the estate for federal taxation purposes. Mr. Justice Black, in writing the opinion, said:

> "Exemptions from taxation do not rest upon implication . . . in an analogous situation federal bonds exempted by statute from all taxation have been held subject to a federal inheritance tax."

The opinion held that the proceeds of the insurance policy must be included in the estate of the veteran for the purpose of collecting federal taxes. It is true that Mr. Justice Black made the distinction that the tax was on the transfer rather than on the property, and with this position certainly no one could quarrel.

What we desire to point out and emphasize is this: The language of the statute which Your Honors construed in the last cited case was, to all intents and purposes, absolutely clear, specific and plain. Congress said that the funds should be exempt from *all* taxation. Your Honors felt, however, that in spite of that language it was not intended to exempt the funds from the tax that would be paid on them as a result of their inclusion in the estate for determining the federal estate tax.

We contend that it logically follows that the phraseology used in section 454a should be regarded as clearly applying only to the matters therein specifically referred to, namely,

claims and particularly *claims of creditors.* Just as in the decision of this Court last referred to it was held that even where Congress used the phrase "exempt from all taxation" it could not be held to cover the inclusion of the proceeds of a government life insurance policy in an estate for federal estate tax purposes, so we suggest that in the present case the phraseology used by Congress, which is not nearly as specific, cannot be said to cover the destruction of vested property rights.

VI

State Community Property Laws Have Been and Are Recognized As Applicable

Preliminary to citing a few authorities on this point, we call attention to the fact that appellants filed, as Appendix B to their statement of jurisdiction, the memorandum ruling of Judge Clarence Hanson of the Superior Court of Los Angeles in the case of *Johnson* vs. *Shelton*, filed on February 28, 1949. While we doubt that decisions of the Superior Court are particularly helpful in this matter, we call attention to the fact that up to that date, namely February 28, 1949, there had been four decisions in the Superior Courts of California on this particular matter. Namely, *Cora Belle Bennett* v. *Modesta Lee Bennett* decided in the appellate division of the Los Angeles Superior Court by Judge Myron Westover on March 20, 1946, holding that the wife was entitled to recover her community half of the insurance from the beneficiary; *Wissner* v. *Wissner*, the instant case, which was decided by Superior Court Judge B. C. Hawkins of Stanislaus County, in which he took the same position as that of Judge Westover; *Carballo v. McFann*, decided by Judge Otto J. Emme in the Los Angeles Superior Court on November 5, 1949, who likewise held the wife entitled to recover her community half of the payments under the policy from the beneficiary.

The decision of *Johnson* v. *Shelton*, set forth as Appendix B of appellants' statement on jurisdiction was fourth of the decisions in this state and in that decision Judge Hanson not only overruled the higher courts of California, but, without mentioning any of them, overruled the two prior decisions of judges in his own Superior Court in Los Angeles.

In *United States* v. *Robinson*, 40 Fed. 2d 14, it was held that the state law of Louisiana should apply in determining the rights as between a legal and a putativo wife.

Succession of Lynch vs. *United States*, 17 Fed. Supp. 674, cites *United States* v. *Robinson* and takes the same position. It is likewise worthy of note that in this case, at page 676, it is recognized that the proceeds of the policy are community property where the premiums are paid by community funds. We quote the following from the decision:

> "In default of a named beneficiary, proceeds of this policy fell into the community, *since it was taken out and the premiums were paid during the existence of the good faith relation which ended only at the death of Silas Lynch* (the soldier). *The policy was thereby matured and Emma Lynch became the owner of one-half of this community estate.* . . ."

United States v. *Primilton*, 76 Fed 2d 555. Here again the case of the *United States* v. *Robinson*, *supra*, is cited with approval and the opinion shows that the United States in prosecuting its appeal from the District Court of the United States for the Western District, took the position that the character of the proceeds of the insurance was to be determined by Louisiana law and that it was the property of the community.

Other cases supporting the contention that the character of the funds is to be determined by state law are:

United States v. *Rose*, Tex. 57 S. W. 2d 350 where it was held that premiums were paid from community earnings and

awarded one-half the insurance to the widow. Appellee United States was a party to that action and *United States* v. *Robinson, supra,* was cited with approval.

Succession of Jones, La. 169 S. 440 cited *United States* v. *Robinson* with approval and held that premiums were paid during wedlock out of soldier's pay; that the soldier and his wife were residents of a community property state and the insurance became a community estate and the wife was entitled to one-half as the surviving spouse in the community.

The appellants in this case place some reliance on *James* v. *United States* (S. D. Cal. 147 unreported), and attach a copy of the findings of Judge Harrison in said matter marked as Appendix "C". As we view this case any remarks made by Judge Harrison contrary to the decision in *Wissner* v. *Wissner* are purely dictum and the decision itself has no bearing on the situation that now confronts your Honors.

Under Texas law the wife has no vested interest in life insurance purchased with community funds as she definitely has under California law. The wife's interest in Texas is but an expectancy as she must show not only that the premiums were paid by the husband with community property and another person named as beneficiary, but she must also show the express intent of the husband to defraud her.

Lawrence v. *Shaw,* 300 U. S. 245 (57 Supreme Court 443) relied upon by appellants and also cited in *Barton v. U. S.* and *Johnson* v. *Shelton* related only to the question of exemption from taxation. Chief Justice Hughes held that the exemption continued after the money was deposited in the bank so long as it could be identified and so long as it had not been reinvested. We fail to see that this case applies to any of the present issues.

Other cases relied on by appellants to show the jurisdiction of this court we comment on very briefly as follows:

Lewis v. *U. S.* 56 Fed. (2d) 563. *Court applied local law* which provided that a change of beneficiary executed on a Sunday was voidable but held that the insured had affirmed such act and hence the change was valid between contestant claimants. It is interesting that both sides relied on *local* law in this case.

U. S. v. *Sterling*, 12 Fed. (2d) 921. In this case the United States was a party. The court held that no agreement could defeat the insured's right to change beneficiary (which we agree with) and further that the beneficiary was properly changed by the insured. In that case, the point before the court was specifically covered by the contract and the federal statute, and the United States was a party to the action.

Counsel for appellants have cited approximately fifty cases without discussing any of them. These cases were cited by counsel in the California courts and we analyzed them and are convinced that they are lacking in discussion of the one principal point involved in this matter. Hence, we refrain from further detailed consideration of them. We are, however, attaching to this statement as Exhibit "A" printed copy of our Memorandum of Oral Argument Filed by Permission of the District Court of Appeal of California, Third Appellate District, in which we discuss the decision of Judge Mathes in *Barton* v. *U. S.*, 75 Fed. Supp. 703 and present our analysis of the cases relied on by him.

We would not burden this statement with this analysis except that the case of *Barton* v. *U. S.* is the only reported federal case in which an opinion referring to some of the points involved here is found. We believe Judge Mathes' reference to the community property situation was largely

dictum but appellants obviously rely on it to a considerable extent.

VII

Summary of Matters and Grounds Making Against Jurisdiction of This Court

In concluding this statement we briefly point out our contentions as follows:

1. This is not a suit in which the United States is involved as a party.

2. The validity of the Congressional Act is not questioned and the holding in the case does not conflict with it in any way.

3. Appellants' only contention is that this Court has jurisdiction because Section 454a contains the language:

> "benefits shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever"

and as shown by this statement the courts have established that this language does not mean what appellants contend and that the proceeds are subject to court process and to seizure and to sequestration for the protection of certain rights.

4. The language of Section 454a was intended to apply to *claims* and to creditors.

5. The proceeds of the policy in question here are without question community property of the appellee and her deceased husband under the laws of California and are admitted to be such by the pleadings.

6. There is nothing in the language of 454a that seeks to take away the vested admitted community property

right of the wife and every indication is that it was never intended that the statute go that far.

7. No court would uphold a secret agreement between a private individual and the husband depriving the wife of her interest in the proceeds of insurance.

We do not believe the United States Government intended to enter into such a secret agreement and certainly no such agreement is necessary to the operation of the Veterans' Insurance Program.

8. This Court has already held that the act will not be construed to destroy the well recognized right of the United States government to include the proceeds of the policy in an estate for taxing purposes.

9. The logical conclusion from this holding is that the act will not be construed to destroy the well recognized vested property rights of women in California and other community property states.

10. Courts have recognized that the funds are subject to seizure, process, and sequestration for alimony, support, and in guardianship matters. The interest of the wife provided in community property states is only an indirect method of providing ahead of time for her support and care. Certainly it was not the intention of Congress to destroy this right.

We have attached to this statement a motion to affirm the judgment of the Appellate and Supreme Courts of California and to dismiss appellants' appeal to this Court.

We respectfully and most earnestly submit that this court should leave controversies of this character between individuals only and not involving the United States or any representative thereof wholly in the hands of the state courts

and that jurisdiction of the Supreme Court of the United States in this case is not indicated.

Respectfully submitted,

LESLIE A. CLEARY, of
CLEARY and ZEFF,
Attorneys for Appellee.

Receipt of a copy of the above Statement is acknowledged this 31st day of May, 1949.

CARLOS J. BADGER and
VERNON F. GANT,
By CARLOS J. BADGER,
Attorneys for Appellants.

EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Civil No. 7528

MARGARET V. WISSNER, Plaintiff and Respondent,

vs.

LOUISE M. WISSNER and LEANDOUS H. WISSNER, Defendants and Appellants.

MEMORANDUM OF RESPONDENT'S ORAL ARGUMENT FILED BY PERMISSION OF COURT

CLEARY AND ZEFF,
County Offices Building, Modesto, California,
Attorneys for Respondent.

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MEMORANDUM OF RESPONDENT'S ORAL ARGUMENT FILED BY PERMISSION OF COURT

This memorandum is filed by permission of your Honors after the presentation of oral argument and will be directed largely toward an analysis of the case of *Barton v. United States*, 75 Federal Supplement, 703, and a summary of the cases therein cited.

It will be our purpose to set forth the summary of the cases cited in this Federal District Court decision as briefly as possible, but with the full intention of giving a fair representation of the real point at issue and the decision thereon in each case.

Analysis of the Decision in Barton v. United States, Supra

1. The Facts.

The deceased soldier Barton had a National Service Life Insurance Policy issued pursuant to the Act of 1940, as amended by 38 U.S.C.A., paragraphs 801 to 818.

At the time the policy was issued shortly after July 3, 1943, the deceased Barton was not married. He named his mother as first beneficiary under the policy and his brother as contingent beneficiary. On September 20, 1944, the deceased Barton married Shirley Jean O'Leary Barton at Oakland, California, and they remained husband and wife, residents of California at all times after their marriage and up to the date of his death, which occurred on April 2, 1945. The deceased made no effort to change the beneficiary prior to his death.

The plaintiff, surviving widow of the deceased, filed a claim with the Administrator of Veterans' Affairs for her community one-half interest of the portion of the proceeds resulting from the payment of premiums from community funds. It was agreed that approximately 30% of all premiums paid were paid from the service pay of the deceased after the marriage, and that such pay was community property under California law. The Administrator denied plaintiff's claim and awarded all of the proceeds to the insured's mother as the named beneficiary.

Judge Mathes who wrote the decision in question states that "Resulting 'disagreement as to any claim' gave rise to this suit," citing 38 U.S.C.A., 817 and 445c.

At the time of the oral argument I read to your Honors a portion of Section 445 as follows:

> "The term 'claim' as used in this section means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veterans Affairs or someone acting in his name on an appeal of the Administrator."

Section 445c provides:

> "A denial of a claim for insurance by the Administrator of Veterans' Affairs or any employee or agency of the Veterans Administration heretofore or hereafter designated therefor by the Administrator shall constitute a disagreement for the purpose of Section 445 of this title."

Throughout this discussion of *Barton v. United States*, we will at appropriate points interpolate our comments concerning the conclusions of the Federal Court and the authorities cited in support thereof.

In line with this thought I call attention now to the fact that this section seems to definitely indicate the intent of Congress to provide only for the litigation of disagreements involving the question of the payment of the funds by the United States to the person entitled thereto under the contract of the soldier. It does not purport to cover the litigation of the rights of the California wife, under our community property laws, in and to funds that have left the hands of the United States government and are in the possession of another resident or citizen of the State of California.

We now direct your attention to the fact that Judge Mathes by his own statement with reference to the resulting "disagreement," which I quoted above, was centering his attention on the disagreement as to whom *the United States should pay the proceeds of the insurance*. If, as we contend, this problem is separate and distinct from the question as to the rights of California wives against those who have received community funds from the government, Judge Mathes' decision went far beyond the "disagreement" that he was required to settle.

2. The Law

From this point on we will consider the law referred to by Judge Mathes in the opinion in question quoting his statements and discussing the cases cited by him in support thereof.

(a) "The insurance contract, as set forth in the act, is solely between the Government and the insured. 'The

only relations of contract were between the Government and him' * * * Plaintiff admittedly is not a beneficiary within the language of that contract * * *"

Judge Mathes cites three cases in support of this statement, but we do not believe that it is necessary to extend this discussion by repeating the citations or considering the cases as we concede that these points made by Judge Mathes are correct. The opinion continues:

"So any right of plaintiff to share in the proceeds must rest solely upon the claimed supervention here of California's community property law. (Cf. Cassarello v. United States, D. C., 271 Fed. 486, 488, affirmed, 3 Cir. 1922, 279 Fed. 396)."

The facts of the last cited case were very briefly as follows: The deceased soldier had obtained a veterans' insurance policy through the Bureau of War Risk Insurance. He failed to name a beneficiary in the *policy*. In the *application* he named Patsy Gillette. The decision in the District Court gave to the plaintiff, the executor of the Estate of Patsy Gillette, all the installments falling due up to the death of Patsy Gillette, and admitted in evidence for the purpose of fixing the beneficiary the application signed by the deceased soldier. On appeal to the Circuit Court, 279 Fed. 396, the Circuit Court mentioned three disputed points that were involved. Among them

"The admission in evidence of Lawrence Siegle's (deceased soldier) application for insurance"

stating

"as the question raised by this last assignment underlies and is decisive of the whole case, we first turn to it."

The Court said that the claim for the exclusion of this application was based on a Pennsylvania statute and that that statute specifically governed companies organized under the laws of Pennsylvania or foreign companies doing business therein. Further, said the Court:

"Manifestly that statute has no application to the present certificate for the United States which issued it

> was not an insurance company, and its certificate was not one issued by 'companies organized under the laws of this state or by foreign companies doing business therein.' The statute simply does not apply * * *"

It was further pointed out in the original decision in this case, 271 Fed. 486, at 489 and 490, that the contract of insurance itself made the *application* a part thereof.

It is apparent, therefore, that in this particular case the decision was actually based on the fact that there was no conflict between the state law and the United States statutes in question because the application was included in the contract by agreement and because the Pennsylvania law by its wording did not cover policies issued by the United States.

Continuing, Judge Mathes said:

> "If state law controls, plaintiff's claim is sound to the extent of one-half of that portion of the proceeds paid for with community funds."
>
> *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351.

This statement is unquestionably the law, and a discussion of the case cited as authority therefore becomes unnecessary.

> (b) "Whether state law can control disposition of proceeds of policies issued pursuant to the National Insurance Act of 1940, 38 U. S. C. A. Section 801 to 818, depends upon the intent of Congress; for it is clear that the act, being a constitutional exercise of powers granted to Congress (U. S. Const. Art. I, Sec. 8, Cls. 1, 13), is 'Supreme Law of the Land'," (citing three cases which we will hereafter discuss.)

In our oral argument we directed your Honors' attention to the fact that we believe Judge Mathes' premise in this statement is entirely wrong; namely, that the determination of the question depends upon the *intent of Congress*. We take the position that in order to sustain Judge Mathes' decision it must appear first, that Congress intended to destroy the community property rights of California women, and second, that such destruction was "necessary and proper" for carrying into execution the

insurance program. This contention is based on the fact that the power of Congress to create federal insurance for soldiers can only be exercised within the limits of Article I, Section 8, cls. 18 of the United States constitution and that, therefore, the Act of Congress must be subjected to this test; namely, is it necessary and proper to destroy the recognized community property rights of women in any state in order to carry out the soldiers insurance program? We, of course, agree that a Congressional Act is the supreme law of the land providing it is constitutional. We do say, however that no Congressional act is the supreme law of the land insofar as it attempts to go beyond the limitations of the Constitution of the United States, and we feel that Judge Mathes failed to consider whether or not, if Congress intended to destroy community property rights by the act, it was necessary and proper for it to go that far.

The cases cited by Judge Mathes under this section of his opinion are as follows: *Mayo v. United States*, 319 U. S. 441, 87 L. Ed. 1504. The problem involved in this case is as follows: The Federal government through the Agricultural Adjustment Administration was engaged in the business of furnishing fertilizer to Florida farmers under the Soil Building and Conservation Program. There was on the statute books of Florida an act providing for the inspection of fertilizer and the payment by the distributor of a reasonable inspection fee to the state. A specially constituted Federal District Court enjoined the Commissioner of Agriculture of the State of Florida from enforcing the provisions of the state act against the United States. Mr. Justice Reed in deciding the case said, in substance, that these inspection fees were charged directly upon the United States, and if nforceable, would be required before executing a function of government. These fees, he stated, "are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials." He concluded that the United States freedom from state fees or taxes where the federal government is carrying on a proper function is "inherent in sovereignty," and therefore sustained the injunction.

In deciding the case he stated that it was to be distinguished from three other types of cases; namely, (1) a state

statute which fixes a tax on the salary of an employee of the United States; (2) a state statute fixing a tax on purchases made by a supplier of the United States Government; and (3) a state statute fixing price control of a contractor with the United States. (319 U. S., pages 447-448.)

Prigg v. Pennsylvania, 41 U. S. 539, 10 L. Ed. 1060. This case was decided in 1842. The discussion and numerous opinions cover 82 pages of very fine print, but summarizing the situation as briefly as possible, it appears to us to be as follows: A slave girl named Margaret Morgan escaped from her owner, Margaret Ashmore, in the State of Maryland, fleeing to the State of Pennsylvania for some time, long enough, in fact to give birth to a second child. Margaret Ashmore, the owner, appointed Edward Prigg her agent and attorney to return the slave to her possession in Maryland. Prigg proceeded to Pennsylvania, had a state constable under a warrant from Pennsylvania apprehend the negro woman and take her before a magistrate, who refused to take further cognizance of the case. Prigg thereupon removed the negro woman and her children from Pennsylvania back to Maryland. Prigg was indicted in the Lower Court of York County, Pennsylvania, under a statute of Pennsylvania passed in 1826 which in substance provided that any person taking or carrying away any negro or mulatto from the Commonwealth of Pennsylvania with the intent of keeping or detaining such negro or mulatto in slavery shall be subject to fine and imprisonment. Prigg plead "not guilty," and on trial by jury a special verdict was found which in substance set forth the facts above outlined, including the fact that Margaret Morgan was actually the slave of Margaret Ashmore. The Court upon this special verdict adjudged Prigg guilty of the offense charged in the indictment. A writ of error was brought to the Pennsylvania Supreme Court where the judgment was affirmed pro forma, whereupon a writ of error was brought to the Supreme Court of the United States and the decision in question is upon that writ of error.

Mr. Justice Story wrote the opinion in the case, page 606. He pointed out the fact that the constitution of the United States specifically covered the point in question in Article IV, Section 2, Cls. 3, "No person held to service

or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." He stated further that Congress acting under the authority of this provision of the Constitution had passed the Act of February, 1793, Chapter 51, which provided, among other things, that the owner of a slave could seize the slave in another state, take him before a magistrate and the magistrate, upon proof of ownership, should issue a certificate for the slave's return to the owner's state and that a section of this act provided a penalty on anyone who knowingly or willingly obstructed or hindered the claimant, his agent or attorney in seizing or arresting such fugitive slave.

In the light of the constitutional provision and the legislative act and without going into detail as to the very interesting discussion of all of the various highways and byways leading to and from the point in question, we merely say that Judge Story came to the conclusion that the Pennsylvania act was unconstitutional because it purported to punish the act of seizing and removing a slave by his master, which act the constitution of the United States was clearly designed to justify and uphold.

In our oral argument we commented on this case to the effect that it seemed to be of little help in determining the present controversy because it was based on such clear facts and contained only decisions of points that are conceded to be correct by everyone.

Pierrard v. Hock, 184 Pacific 494 and 191 Pacific 328.

In this case a suit was brought in Oregon for the purpose of foreclosing a mortgage against a soldier. The Lower Court entered a decree of foreclosure. There was an appeal to the Supreme Court of Oregon where the decree of the Lower Court was reversed, and upon petition for rehearing in the Supreme Court of Oregon that Court reversed its former position and affirmed the decree of the Lower Court. The question presented on the rehearing was whether or not Congress by passing the Soldiers and Sailors Civil Relief Act on March 8, 1918, specifically referred to on page 328

of 191 Pacific, had occupied the whole field or whether a law of Oregon further restricting foreclosures could be applied.

On the rehearing the Supreme Court of Oregon, after considering the language of the Soldiers' and Sailors' Relief Act held that it did occupy the whole field and that the language of that act was incompatible with the language of the Oregon statute in question. Hence the federal act must be determinative of the matter.

In our oral argument we called attention to a quotation appearing in this opinion at page 330 of 191 Pacific where the Court quotes an opinion of Mr. Justice Hughes in the case of *Savage v. Jones*, 225 U. S. 501, as follows:

> "When the question is whether a federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power. • • •
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state."

It was and still is our position that this quotation from Justice Hughes' decision supports our position that the act under consideration by the Court at this time does not cut off the community property rights of California women.

The entire purpose of Federal insurance for soldiers can be carried out without the necessity of avoiding the community property laws of this state and no inconvenience will result to the Federal government. The Act of Con-

gress, carefully read and fairly interpreted, is not in actual conflict with the community property laws of the State of California which would normally entitle the wife to recover her community one-half of the proceeds of the insurance policy from the beneficiary.

Judge Mathes continues:

> "The act provides: 'The insurance shall be payable only to a widow, widower, child, parent, brother or sister of the insured. The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided: Provided, That the provisions of this subsection as to the restricted permitted class of beneficiaries shall not apply to any national service life-insurance policy maturing on or after August 1, 1946.' (38 U. S. C. A. p. 802(g))"

(After the end of the war the government recognized the soldiers' right to name any beneficiary regardless of relationship and subject, we presume, only to the general rule that the beneficiary have an insurable interest.)

> "The policy at bar matured prior to August 1, 1946, hence was subject to the 'restricted permitted class of beneficiaries.' Section 802(h) contains comprehensive provisions as to the manner in which the proceeds shall be paid in installments to beneficiaries designated by the insured, if living; and as to whom shall be paid 'any installment certain of insurance remaining unpaid at the death of any beneficiary.'"

> "Section 802 (i) provides as to policies maturing prior to August 1, 1946, that 'The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any • • • such insurance • • •.' While Section 802(j) declares that 'No installments of such insur-

> ance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary . . .' (See also 38 U.S.C.A. Sections 802(x) and 808.)"

Judge Mathes then makes what seems to us to be a wholly illogical and irrelevant statement as follows:

> "The cited provisions are persuasive that it was the purpose of Congress to provide in all details for the issuance and administration and settlement of service life insurance on a national basis, as the title of the Act implies."

There is no reason why we should not assume that Congress not only intended to provide, but did provide, all details for the *issuance* and *administration* and *settlement* of service life insurance on a national basis. Assuming that Judge Mathes' statement is correct and unquestioned, the statement does not in any way foreclose the right of a California wife to claim from the beneficiary her proper community share of the proceeds after the beneficiary has them.

The cases cited by Judge Mathes in support of his statement may well be unimportant if the Court agrees with us in our position that the statement itself does not hit at the meat of the problem with which we are faced, but for the purpose of being as helpful as we may be, we give the following summary:

> *James Stewart & Co. v. Sandrakula*, 60 Super. Ct. 431, 84 L. Ed. 596.

The question involved in this case was whether or not a New York Labor Law requiring a builder to board over all steel tiers for the protection of employees was effective where the contractor was employed in building a building for the United States upon land owned by the United States under a contract between himself and the United States, having in mind the fact that the contract provided in substance that state and municipal building restrictions do not apply to the land inside government lot lines. The Supreme Court decided that while all of the provisions of the

labor law of New York in question could not be enforced within the boundaries of property owned by the United States, this particular requirement of the law would not in any way interfere with the sovereignty of the United States or the construction of the building. The Court said it might slightly increase the cost, but since there was no Act of Congress directly in conflict with the provision of the New York labor law in question, it was proper that it should be enforced. The Supreme Court said further that the clause in the contract reading "state or municipal building regulations do not apply to work inside the government lot lines," was not properly admissible in evidence because the contractor did not share in any governmental immunity, and furthermore, they were of the opinion that this clause applied to types of material, fire hazards, and similar situations covered by the New York City Building Code.

New York Central R. R. Co. v. Winfield, 244 U. S. 147, 61 L. Ed. 1045.

The facts in this case are as follows: An employee of a railroad company engaged in interstate commerce was injured without any negligence on the part of the railroad. He sought compensation for the injury under the Workmen's Compensation Law of New York and compensation was granted. The insurer brought this writ of error in the Supreme Court of the United States.

Mr. Justice Van Devanter delivered the opinion of the Court holding that the federal employers' liability act passed by Congress for the purpose of covering injuries sustained by railroad employees engaged in interstate commerce occupied the entire field, and that the state act was therefore ineffective.

Judge Brandeis dissented, saying among other things:

> "The question must, of course, be determined with reference to the settled rule that a statute enacted in execution of a reserve power of the state is not to be regarded as inconsistent with an Act of Congress passed in the execution of a clear power under the constitution unless the repugnance or conflict is so direct and positive that the two acts cannot be recon-

ciled or stand together. (*Missouri K. & T. R.R. Co. v. Haber*, 169 U. S. 613, 42 L. Ed. 878)."

In order that this decision might be a direct authority on the problem that now confronts this Court, the act of Congress providing for the compensation of injured employees in interstate commerce would have had to go so far as to control the rights of the husband and wife in that compensation after it was received by the injured employee. Suppose, in other words, Congress attempted to say that funds recovered by a husband as a result of an industrial injury incurred while engaged in interstate commerce are entirely free from any community property rights of the wife as fixed by state law, does it seem likely that such an extension of the provisions of that act would be held "necessary and proper" in executing its power to regulate interstate commerce as against community property laws enacted under the reserve powers of the states?

United States v. Fuller, 97 Fed. (2d) 541.

The facts in this case were as follows: In this case it was admitted that the federal statutes governing veterans' insurance provided that payment of monthly installments should be made to the personal representatives of the person entitled after the latter's death when the combined amounts are more than $1,000.00.

The claimants were not the personal representatives but were the heirs of the person entitled. They had filed no claim with the administrator, but their position was that under the state laws of Louisiana the "intestate succession" vests in the legal heirs by operation of law at the instant of the death of the deceased and that no administration is necessary.

The Court held that since the federal statute specifically provided that payment must be made to the personal representative, the state law could not be applied as it was in direct conflict therewith.

We call particular attention to a portion of the language used in this decision found on page 542:

"Such claims have their basis and foundation in the Federal statutes, which, creating the claims and the

> conditions under which they may be maintained, completely govern and control *their presentation as claims*, and suits brought upon them, *against the United States.*"

This language fits so closely the position we take that it naturally seems of considerable interest from our point of view. In other words, this Court says that the Federal statute controls the presentation of claims to the United States and suits upon claims against the United States. There is no indication that the Court believes that the statute goes any further than this, or needs to go any further than this, in carrying out the veterans' insurance program.

Judge Mathes continues his decision with this statement:

> "This view finds added support in Section 816 (See 38 U.S.C.A. Sec. 454a), which directs that 'Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary'."

It is to be noted that the Section of the United States Code Annotated above quoted by Judge Mathes applies only to *attachment, levy* or *seizure* of the funds in question. Certainly this section of the act does not mean that the funds are entirely exempt from legal or equitable process. Let us suppose that the funds come into the hands of the veteran himself by payment of the policy when it matures. He has two minor children who are entitled to his support. He is a confirmed drunkard, and in a proceeding before a Superior Court of this state to require him to support his children it appears that these funds received from a veterans' insurance policy are rapidly being squandered and dissipated by him in drinking and gambling. Is there any question but that the state court could require the use of those funds for the support of the children and by its process hold such amount as might be reasonable for that

purpose. Such action by the Court would in no wise conflict with the Veterans' Insurance Act and certainly would not be prohibited by the section of the United States Code Annotated cited by Judge Mathes.

Suppose, on the other hand, the policy in question has been converted to an endowment policy, and the veteran and his wife have paid the premiums from community funds for many years. Under the contract with the government the veteran alone is entitled to receive the proceeds of the policy when it comes due. The proceeds are paid into his hands. He and his wife become involved in a divorce action in which she requests the Court to protect her community interests in these funds which are in the bank. It seems hardly likely that the courts of this state would not have the right to use their process for her protection, and certainly nothing in the Congressional Act involved in this appeal would conflict with such a use of the California courts' powers. If we are correct in this position, then it must naturally follow that the California courts may use their powers to protect the wife's interest in the funds by awarding judgment against the beneficiary who has received those funds and is subject to the jurisdiction of the courts of this state.

In short, the question of attachment, levy or seizure is not a question involved in this particular appeal, and it is obvious that that language was used for the purpose of protecting the funds from seizure by creditors up to a certain point.

(c) Judge Mathes states that:

> "Federal control of title to the proceeds of service insurance, both before and after payment by the Government, has been consistently recognized and enforced."

This statement is true to a very limited extent, and it is equally true that Judge Mathes does not cite and cannot cite any instances where the government has intervened against a wife in California attempting to assert her community property rights as against a person who admittedly has received community property without consideration.

The cases cited by Judge Mathes on this point are as follows:

Lawrence v. Shaw, 300 U. S. 245, 81 L. Ed. 623.

This case involved the following situation. The World War Veterans Act of June 7, 1924, provided that the compensation and insurance allowances should be exempt from all taxation. The petitioner in this case was the guardian of a veteran who had received compensation from the United States Government and deposited it in his bank account as guardian of the veteran. The assessor tax collector assessed the funds for taxation, and on an agreed statement of facts the question presented was whether or not the exemption provided by the act was applicable to the funds after they reached the hands of the veterans. Chief Justice Hughes held that the exemption did apply as long as the funds were merely kept in the bank account and were not reinvested, but that the exemption disappeared upon reinvestment. He stated that it was not the intent of the Congressional Act that in order to claim the exemption the veteran or his guardian had to keep the funds in his pocket, and that merely by depositing it in the bank the exemption was not lost. Chief Justice Hughes called attention to the fact that in the stipulation as to facts it was agreed that the funds were "uninvested balances."

Lewis v. United States, 56 Federal (2d) 563.

This case involved a soldier's policy of insurance obtained by application for reinstatement and conversion. The policy was issued with his aunt as beneficiary and delivered to him July 1, 1927. On August 19, 1928, the insured by a letter directed the Veterans' Bureau to change the beneficiary to his wife, Virginia T. Mossett. The change was made a few days later. The insured died December 5, 1928. Mary C. Lewis, the first named beneficiary, made claim for the proceeds. The Veterans Administration refused to pay her and she brought suit against the United States and Virginia T. Mossett. Virginia T. Mossett, of course, claimed as the named beneficiary. Mary Lewis claimed that the attempted change of beneficiary was invalid for several reasons: (1) because the insured was so intoxicated at

the time that he did not know what he was doing; (2) because the letter directing the change was written on Sunday and was invalid under the laws of Pennsylvania; and (3) because she had an agreement with the insured for which said paid him a consideration and by which he was not to change the beneficiary.

The District Court granted a nonsuit and also denied a new trial. The Circuit Court held that the issue of intoxication should have been submitted to the jury; that the matter of the letter being written on Sunday presented the question of a voidable contract that may have been affirmed by later acts and that this also should have been submitted to the jury; that the agreement not to change beneficiary was not enforceable; that since the policy in question was converted insurance, there was no limitation on the naming of a beneficiary, and the question of whether or not Virginia Mossett was the wife of the insured was not important; and that whether or not she had an interest was not important because the letter amounted to an assignment and that an assignment would have been perfectly proper. The Upper Court reversed the judgment of nonsuit and remanded the case for further proceedings in accordance with its opinion.

We are unable to see that this decision has any relevancy at all in connection with the assertion of Judge Mathes quoted at the beginning of this subsection (c) of our memorandum.

Culp v. Webster, 25 Cal. App. Supp. (2d) 759, 70 Pac. (2d) 273.

The undisputed facts in this case were that the defendant was a veteran of the First World War; that he had cashed in his adjusted service certificate and held the proceeds separate and distinct from other funds at all times. The plaintiff obtained a judgment against the defendant for $300.00. On supplementary proceeding the defendant was ordered to deposit the sum of $300.00 with the Marshal. The defendant did so and then made a claim of exemption on the basis that the deposit was made from moneys received on his adjusted compensation certificate.

The Court examined the federal statutes applying to the provisions of the adjusted compensation certificates issued in the First World War and determined that the provision applying at that time is now included in Section 454a, Chapter 10, Title 38 U. S. C. A. This statute specifically provides that payments due or to become due under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure.

The Court held that the funds were exempt from claims of creditors and, therefore, exempt from seizure to pay such claims. Hence, it affirmed the order granting defendant's motion for exemption of property from execution.

Judge Mathes continues as follows:

> "Congressional purpose to secure nation-wide uniformity is further manifested in Section 817, which confers jurisdiction upon the federal courts 'to hear and determine all * * * controversies' which may become the subject of suit 'in the event of disagreement as to claims' under any policy issued pursuant to the Act (38 U. S. C. A. Section 445, 551.)"

As we pointed out in our oral argument, and have briefly mentioned in this memorandum, Section 445 of 38 U. S. C. A. and Section 551 thereof do not seem to us to give any comfort or help to Judge Mathes.

Section 445 says "In the event of disagreement as to claim * * * under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder, an action on the claim may be brought against the United States * * * All persons having or claiming to have an interest in such insurance may be made parties to such suit * * *." The section further provides for an interpleader by the United States where there is a dispute as to the persons entitled, but this section concludes with the definition which we quoted above:

> "The term 'claim' as used in this section means any writing which alleges permanent and total disability at a time when the contract of insurance was in force or which uses words showing an intention to claim

> insurance benefits, and the term 'disagreement' means a denial of the claim by the Administrator of Veteran Affairs * * *."

Section 551 does not add anything to Section 445 insofar as our present controversy is concerned. If the definition is read in conjunction with the first statement of Section 445, namely, "In the event of disagreement as to claim," it appears to us that it is quite obvious that neither the disagreement contemplated by the section or the claim contemplated by the section is involved in the present controversy.

Quoting again from Judge Mathes' opinion, we find this statement:

> "It is settled that 'the authority of state laws or their administration may not interfere with the carrying out of a national purpose.' (James Stewart & Co. v. Sandrakula, supra, 309 U. S. at page 103, 60 S. Ct. at page 436)."

This statement of Judge Mathes appears to be correct with certain qualifications, namely, first: the national purpose involved must be delegated to the national government by the Federal constitution, and second: the Congressional Act in question can go so far and only so far as its provisions are *necessary and proper* to execution of the primary purpose delegated to the Federal government by the United States Constitution.

Judge Mathes continues with the following statement:

> "Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to void a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle."

Judge Mathes cites *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. Ed. 1915, in support of this statement.

This case involved the question of whether or not a state law of Arizona limiting the length of passenger trains to fourteen cars and freight trains to seventy cars was invalidated by the commerce clause of the United States Constitution and the Acts of Congress in pursuance thereof. Mr. Justice Stone delivered the opinion and held that the state act was in conflict with the Federal Constitution and the Congressional Acts. He pointed out that at that particular time when we were in war, the Arizona act was more restrictive than any other state, except Oklahoma, and that it resulted in the necessity of breaking up trains in order to get them through the State of Arizona, thus definitely hampering the handling of interstate commerce. Justices Black and Douglas dissented.

We have already summarized the other two cases cited by Judge Mathes in this portion of the opinion, namely, *James Stewart & Co. v. Sandrakula*, supra, and *Mayo v. United States*, supra. His citation of *Southern Pacific Co. v. Arizona*, supra, does not seem to be a particularly happy choice insofar as the problems in our case are concerned, but within constitutional limits the dominancy of federal acts is unquestioned.

Continuing further Judge Mathes states:

> "Had Congress intended to permit state law to control as to any beneficial interest under service insurance policies, precedent gives assurance that language appropriate to such a purpose would have been employed."

In support of this conclusion the case of *Helmholz v. Horst*, 294 Fed. 417 at 419, was cited.

We have read this case with some care and do not find any statement in the opinion giving assurance that had Congress intended to permit state law to control any beneficial interest, language appropriate to such a purpose would have been employed.

The contest in this case was between a brother and some half-sisters of the deceased soldier and an aunt who had stood in the relation of *loco parentis* toward the decedent. He left a document which was questionable as a will, but

the Lower Court found that there was no question that the deceased intended by the document to name his aunt as beneficiary.

At the time the policy was issued an aunt was not within the permitted class of beneficiaries, but later Congress adopted an amendment including "persons who have stood in loco parentis to a member of the miltary or naval forces at any time prior to his enlistment or induction for a period of not less than one year." The War Risk Insurance Act provided that the terms and provisions of the insurance contracts issued under it should be subject in all respects to the provision of the act and any amendments thereto. The latter amendment extending the permitted class of beneficiaries above referred to specifically provided that it should be deemed to be in effect as of October 6, 1917, a date prior to the issuance of the policy in question.

The Court held that the District Court was correct in determining that the deceased had named his aunt as beneficiary and that the amendment was a part of the contract and, therefore, she was entitled to receive the proceeds of the insurance from the United States.

(d) Judge Mathes makes the final statement:

> "I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U.S.C.A. Sections 801-818. It follows then that California's community property law (Cal. Civ. Code, Section 164), can confer no right on plaintiff to share in the proceeds of the policy at bar.
>
> "My learned colleague Judge Harrison so held with respect to the community property law of Texas in James v. United States, et al., D. C., S. D. Cal., 1947."

The case of *James v. United States* has been discussed in our brief, and it is therefore unnecessary to refer to it at any greater length.

If Judge Mathes intends by his final statement quoted above to indicate the opinion that the Congressional Act

in question forecloses the right of a California wife to enforce her community interest against one who has received community funds under a national insurance policy, we are firmly of the opinion, as already indicated, that his decision is contrary to the act and contrary to constitutional provisions.

The two Federal decisions on this matter, namely, *Barton v. United States* and *James v. United States*, are the decisions of trial courts in the Federal Judicial system, and while we do not wish to detract from the importance of the position of Federal District Judge, we assume that the Federal Trial Court has approximately the same position in the Federal Judicial System as that of the Superior Court in the State Judicial System.

Most of the cases cited in the opinion rendered by Judge Mathes in *Barton v. United States*, supra, are cases involving an attempt on the part of a creditor, a taxing agency, an heir, or some other persons to enforce a right that has not heretofore existed in the proceeds resulting from veterans' insurance. The case now before the Court presents practically a reverse situation. The contention of the appellant must be that although the proceeds of the policy were community property in which under the laws of California the wife had a fixed right, the Act of Congress takes away that existing right and completely destroys it.

As we pointed out in our brief, the case of *Lynch v. United States* (see page 46 of Respondent's Reply Brief) held that the veteran's contract of insurance with the United States is property. The pleadings admit and the evidence shows that this particular piece of property was the community property of the insured and his wife. It logically follows from this statement of facts that the question is did the Congressional Act intend to take away this existing property interest of the wife, and if it did intend to, was it necessary and proper to the execution of the power delegated to Congress by the United States Constitution.

The United States Constitution, Article I, Section 8, Cls. 12 gives Congress power "to raise and support armies • • •"; Cls. 13, "To provide and maintain a navy."; [illegible]

Cls. 14, "To make rules for the government and regulation of the land and naval forces."

We assume that the insurance program for veterans is constitutional because it is necessary and proper for carrying into execution the powers last mentioned.

Veterans' insurance obviously was enacted to provide for veterans' dependents, and first among those dependents in the permitted class of beneficiaries was listed the wife of the veteran. Hence, the eventual sharing by the wife in any fund created by the insurance could scarcely be outside the purpose of the insurance.

Women have always borne a heavy burden in the wars fought by this country. Theirs has been the heart-breaking task of remaining at home, away from the excitement and activity of the war itself, doing the less glamorous tasks, and suffering the agonies of uncertainty as to the fate of their men. How anyone can say it is necessary and proper in maintaining armies and fighting a war to enact federal legislation that will unsettle the property rights of women in the many community property states and make them less secure and more uncertain of their position during war times is something we do not understand. Any portion of the Congressional Act here in question that is not necessary and proper to the prime object of raising and supporting armies, or making rules for the government and regulation of the land and naval forces appears to us to be beyond the power of Congress.

As we view the decisions rendered by Judge Mathes and Judge Harrison, we are impressed with the fact that they fail to consider the broad and sweeping effect of their conclusions. They are considering the one case before them at that time and forgetting the fact that their language, if followed, would destroy community property interests of women in California in policies of insurance that have been in existence in many cases for twenty to thirty years. They are forgetting that, modestly speaking, hundreds of thousands of dollars of women's community property interest would by their decision be annulled in each community property state. This matter has gone beyond the controversy between Margaret Wissner and the mother of the deceased Leonard Wissner, and now involves the rights of all women in all community property states that have by

the laws of those states an existing property interest in converted veterans' insurance.

We conclude this memorandum by again repeating a portion of the opinion of Chief Justice Hughes taken from the case of *Savage v. Jones*, supra:

> "*If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.* * * *
>
> "But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. *In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*" (Italics ours.)

Can it be said that the purpose of the act cannot be accomplished or that its operation within its chosen field will be frustrated unless the community property rights of women in community property states are destroyed? Is it not rather true that the Congressional Act here in question is not in actual conflict with the law of the state if it is fairly interpreted, and that therefore the right of the plaintiff and respondent in this case to enforce her community property interests against the defendant, who has received and used community property without any consideration therefor, should be enforced by the courts of California?

We trust that the discussion of the only reported decision on this subject, which we are submitting herewith, may be of some aid to this Court in determining a question that so vitally affects the recognized property rights of women in all community property states.

Dated, Modesto, California, November 1, 1948.

Respectfully submitted,

CLEARY AND ZEFF,
By LESLIE A. CLEARY,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET V. WISSNER,
Appellee

MOTION FOR AFFIRMANCE OF JUDGMENT OF STATE COURT AND DISMISSAL OF APPEAL

Filed: —— day of ——, 1949.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Comes now the appellee, Margaret V. Wissner, and moves the court for an order affirming the judgment of the District Court of Appeal of the State of California, Third Appellate District, in the case of Margaret V. Wissner, Plaintiff and Respondent *vs.* Louise M. Wissner and Leandous H. Wissner, Defendants and Appellants, Civil No. 7528, Sacramento No. 5936, which judgment was filed on the 21st day of January, 1949 and affirming the judgment of the Supreme Court of the State of California denying a hearing in said matter, which said order of the Supreme Court was made and entered on the 21st day of March, 1949.

Said appellee, Margaret V. Wissner, further moves this Honorable Court for an order dismissing the appeal of the appellants herein.

This motion is made on all of the papers, records, and files transmitted to this court from the District Court of Appeal of the State of California, Third Appellate District, and upon the Statement Disclosing Matters and Grounds Making against the Jurisdiction of this Court filed herewith, and on such other records, files, and things as it may be appropriate for this court to consider.

Dated this 31st day of May, 1949.

MARGARET V. WISSNER,
Appellee,
By LESLIE A. CLEARY,
Of Cleary and Zeff, her Attorneys.